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HAWAII REPORTS  
VOLUME 24

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CASES DECIDED

IN THE

Supreme Court of the Territory of Hawaii

August 1, 1917, to June 23, 1919

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**ERRATA.**

**Page 98, last line, word "defendant's" read "plaintiff's".**





# JUSTICES OF THE SUPREME COURT

OF THE

## TERRITORY OF HAWAII

DURING THE PERIOD COVERED BY THIS VOLUME.

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### CHIEF JUSTICES:

ALEXANDER GEORGE MORISON ROBERTSON,  
*Resigned.*

JAMES LESLIE COKE,  
*Qualified March 18, 1918.*

### ASSOCIATE JUSTICES:

RALPH PETTY QUARLES,  
*Term expired.*

JAMES LESLIE COKE,  
SAMUEL BARNETT KEMP,  
*Qualified March 18, 1918.*

WILLIAM SEABROOK EDINGS,  
*Qualified October 3, 1918.*

## ATTORNEYS GENERAL

INGRAM M. STAINBACK,  
*Resigned.*

ARTHUR G. SMITH,  
*Appointed April 18, 1918.*  
*Resigned.*

HARRY IRWIN,  
*Appointed Aug. 31, 1918.*

## **CIRCUIT JUDGES**

**DURING THE PERIOD COVERED BY THIS VOLUME.**

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### **FIRST CIRCUIT.**

#### **FIRST JUDGES:**

**CLARENCE W. ASHFORD,**

*Term expired.*

**CORNELL S. FRANKLIN,**

*Qualified April 8, 1919.  
Recess appointment.*

#### **SECOND JUDGES:**

**SAMUEL BARNETT KEMP,**

**WILLIAM SEABROOK EDINGS.**

*Qualified March 18, 1918.*

**JOHN THOMAS DE BOLT,**

*Qualified October 3, 1918.*

#### **THIRD JUDGE:**

**WILLIAM H. HEEN,**

*Resigned.*

---

### **SECOND CIRCUIT.**

**WILLIAM SEABROOK EDINGS,**

**LESLIE L. BURR,**

*Qualified March 18, 1918.*

---

### **THIRD CIRCUIT.**

**JAMES WESLEY THOMPSON.**

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### **FOURTH CIRCUIT.**

**CLEMENT K. QUINN.**

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### **FIFTH CIRCUIT.**

**LYLE ALEXANDER DICKEY.**

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**CASES DECIDED**  
**BY THE**  
**SUPREME COURT**  
**OF THE**  
**TERRITORY OF HAWAII**

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**WAIANAE COMPANY, AN HAWAIIAN CORPORATION v. KAIWILEI.**

**No. 1010**

**EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.**  
**HON. C. W. ASHFORD, JUDGE.**

**ARGUED JUNE 25, 1917.**

**DECIDED AUGUST 1, 1917.**

**ROBERTSON, C.J., QUARLES AND COKE, JJ.**

**TRIAL—*decision of court in civil cases, jury-waived.***

In the trial of civil cases, where a trial by jury has been waived, the court shall hear and determine the case both as to the facts and the law and its decision shall be rendered in writing stating its reasons therefor.

**ADVERSE POSSESSION—*when once commenced will not be checked by a conveyance to minors.***

If the ancestor or grantor of two minor children was living at the time the statute of limitations had commenced to run in favor of a third person the disabilities through non-age of his grantees could not check or impede the running of the statute.

**SAME—*same.***

An adverse possession which began during the life of the ancestor or grantor will continue as against the infant heirs or grantees.

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*SAME—effect of.*

By adverse possession of land for the statutory period of limitation the adverse holder acquires a title in fee simple which is as perfect as a title by deed. Its legal effect is not only to bar the remedy of the owner of the paper title but to divest his estate and vest it in the party holding adversely for the required period of time.

*SAME—continuity of not destroyed by deed to minors residing on property.*

Where the statute of limitations had commenced to run in favor of defendant the subsequent delivery of a deed of the property by the holder of the paper title thereto, to two minor children of defendant who were then living with defendant upon the property, would not destroy the continuity of defendant's possession nor have the effect of tolling the bar of the statute.

*SAME—claim of title.*

While it is true that the possession must be under claim of title it is not essential that there should be a rightful title. An invalid and defective title, if believed to be good, should be equally as operative as a valid one in giving effect to a possession taken and held under it.

## OPINION OF THE COURT BY COKE, J.

In the year 1875, Hulupii, the patentee of a tract of land situated at Waianae, Island of Oahu, containing about 4.27 acres, by deed transferred the land to Papiano (k) and Kamaka (w), husband and wife. This tract of land is for all intents and purposes composed of two lots. The lower or makai lot is joined to the upper or mauka lot by a short connecting strip about eight feet in width. For the purposes of this opinion the land will be considered as two separate lots and referred to as the makai lot and the mauka lot as the context shall require. Some time prior to April 15, 1889, Kamaka died leaving her husband Papiano and her parents Kaulehua and Mahiai surviving her. On that date the last named parties attempted to partition or divide the land between them and

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a deed for this purpose was made by Papiano who transferred the mauka lot to Mahiai and Kaulehua, and on the same day Mahiai executed a deed transferring to Papiano the makai lot. Kaulehua did not sign the deed to Papiano by reason of the fact that he had become suddenly insane, dying shortly thereafter. On the same day, to wit, April 15, 1889, Mahiai deeded all her interest in the land to the defendant herein, Kaiwilei, who was the foster child of Kamaka, and who, after the death of Kamaka, was reared to womanhood by Mahiai. It appears from the evidence taken in the case that in 1884 all of the parties above mentioned were living on the makai lot, but that at that time certain differences arose between Mahiai and her daughter Kamaka and her son-in-law Papiano and a man by the name of Po, then living with Papiano and Kamaka; that Mahiai at that time expelled these parties from the makai lot and they proceeded to move to the mauka lot, at which place a house was built, and there they continued to live. Mahiai and her husband and the defendant herein, Kaiwilei, who was then a very young girl, continued to live on the makai lot. In 1887 the defendant Kaiwilei was married to a man named Pililaau and they continued to make their home on the makai lot together with Mahiai. The first children born to Pililaau and Kaiwilei were two daughters named Papaenaena and Kamaka (opio). While these two children were mere infants and living with their parents on the makai lot, in the year 1891, Papiano transferred all his interest in the land of Hulupii to them. While Papaenaena was still a very young girl she was taken by relatives to reside at Laie, Oahu, where she remained most of the time until her marriage. Kamaka remained with her parents until she was married, at which time she and her husband moved to the mauka lot where they thereafter resided. In 1914 Papaenaena and her husband sold their interests in the land of

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Hulupii to the Waianae Company, the plaintiff herein, and in March, 1915, Kamaka and her husband executed an exchange deed with the plaintiff whereby the plaintiff acquired all the interests of Kamaka and her husband in the makai lot and in turn transferred to Kamaka the interest of plaintiff in the mauka lot. The defendant Kaiwilei still being in possession of the makai lot the plaintiff in 1915 instituted an action against the defendant Kaiwilei to quiet title to the makai lot which plaintiff claimed by reason of the said conveyances from Papaenaena and Kamaka and their respective husbands. The defendant gave notice in her answer of her intention to rely upon the statute of limitations and title by adverse possession, and upon the trial of the cause her sole defense was based upon these grounds. It is the contention of the defendant that when the division of the land of Hulupii was made between Papiano, on the one hand, and Mahiai and Kaulehua, on the other, that it was the intention of the parties that Papiano should take the mauka lot, where he then lived, and that Mahiai and Kaulehua should take the makai lot, upon which they lived at the time, although by a mistake the deeds, at that time executed, had the reverse effect.

There is a very sharp conflict between the evidence introduced by the plaintiff and that of the witnesses for the defense. The defendant Kaiwilei, in her own behalf, testified that from childhood she lived with Mahiai on the makai lot; that she was present in 1884 when Mahiai expelled Papiano, Kamaka and Po from the makai lot and that these parties then went to live and did live on the mauka lot and both Papiano and Kamaka died while residing mauka; that in 1889, while Mahiai and defendant were still living on the makai lot, Mahiai deeded this lot to defendant, at that time saying, "This is your piece of land," referring to the makai lot. In a very short time Mahiai died and the defendant continued to occupy the premises,

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cultivating and claiming the same as her own; that she has so possessed and occupied the property from the year 1889 to the present date; that all of her children, to wit, fifteen in number, were born on the makai lot, and that her possession and dominion over the lot has been uninterrupted. Her testimony is corroborated by a considerable number of witnesses.

On the other hand the plaintiff has introduced a vast amount of testimony tending to show that the defendant had lived on the mauka lot almost exclusively up to the year 1912, at which time, it is admitted, she went into possession of the lower lot.

The trial court, sitting without a jury, and after the close of the case, rendered a decision sustaining defendant's claim to title by adverse possession and judgment for the defendant was thereafter entered. The plaintiff comes to this court on a bill of exceptions.

Slight material assistance is afforded this court by the decision of the trial court on account of its failure to more fully comply with the provisions of section 2380 R. L., which requires that in the trial of a cause of this nature, where a jury has been waived, the court shall hear and decide the cause both as to the facts and the law and its decision shall be rendered in writing stating its *reasons* therefor. Nothing is contained in the decision of the trial court except the bare statement that "Plaintiff has the paper title. Defendant claims by adverse possession. The evidence, although conflicting, sustains this claim. Judgment for defendant." It is regrettable, and in a measure surprising, that the trial court failed to more liberally comply with the mandate of the statute, especially in view of the frequency with which this court has been compelled to call attention, in language it would seem impossible to misunderstand, to the statutory provision on

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the subject. See *Kahai v. Yee Yap*, 20 Haw. 192; also *Yoshiura v. Saranaka*, 23 Haw. 761.

A single serious question of law is presented for our consideration by the record in this case, namely, did the execution and delivery of the deed to the property in question by Papiano to the two minor children of defendant, then living on the property with the defendant, toll the adverse claim of defendant and thereby interrupt the continuity of her possession in the face of the fact that two years prior thereto the defendant had taken possession of the property, occupied and claimed the same as her own? From the very fact that a minor is under disability to protect his own rights the statutes of the Territory give him protection beyond that afforded the adult. If the right of entry or of action shall accrue to a minor he shall have within five years after reaching his majority to enter or bring action. But in the case at bar the statute of limitations had commenced to run in favor of defendant long prior to the deed of Papiano to Papaenaena and Kamaka. If the ancestor or grantor of the two minor children was living when the adverse possession began the disabilities through non-age of his grantees could not check or impede the running of the statute. See *Armstrong v. Wilcox*, 49 So. 41, 42. An adverse possession which began during the life of the ancestor will continue as against the infant heirs. See 1 R. C. L. 759. A possession adversely commenced is presumed to continue adversely so long as maintained. See *Kalakaua, et al., v. Keaweamahi, et al.*, 4 Haw. 571, 576.

"Where the statute of limitations has once commenced to run no subsequent disabilities can check or impede it." *Doyle v. Wade*, 11 Am. St. Rep. 334, and many authorities cited in the footnotes.

The whole doctrine of prescription is founded upon public policy. It is a matter of public interest that title



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to property should not long remain uncertain and in dispute. The doctrine of prescription conduces in that respect to the interest of society, and at the same time is promotive of private justice, putting an end to and fixing a limit to contention and strife. Protests and mere denials of right are evidence that the right is in dispute and distinguished from a contested title. If such protests and denials, unaccompanied by an act which in law amounts to a disturbance and is actionable as such, be permitted to put a right in abeyance the policy of the law will be defeated and prescriptive rights will be placed upon the most unstable of foundations.

By adverse possession of land for the statutory period of limitation the adverse holder acquires a title in fee simple which is as perfect as a title by deed. Its legal effect is not only to bar the remedy of the owner of the paper title but to divest his estate and vest it in the party holding adversely for the required period of time. See *Leialoha v. Wolter*, 21 Haw. 624, 630.

It has been urged by counsel for the plaintiff that the deed of Mahiai to the defendant herein was a nullity by reason of the fact that the same was not joined in by Kaulehua, the husband of Mahiai, and that defendant could not claim the property under an invalid title. This contention has been refuted in other jurisdictions as well as in Hawaii.

"While it is true that the possession must be under claim of title it is not essential that there should be a rightful title. An invalid and defective title, if believed to be good, will be equally operative with a valid one in giving effect to a possession taken and held under it." *George v. Holt*, 9 Haw. 135, 139, 140.

There is evidence that defendant's husband, Pililaau, was in the year 1901 appointed guardian of the persons and estates of the minor children, Papaenaena and Kamaka, and that for some years the taxes on the property

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were paid by Pililaau and charged against the account of the minors, but there is nothing in the record to show any overt act of dominion over or claim to the property in dispute, either by Pililaau as guardian of the children or by the children themselves either before or after their majority, which would in any wise bring home to the defendant notice that Papaenaena and Kamaka, or either of them, claimed the makai lot or any interest therein. We know of no precedent for holding that the mere fact that a deed was executed by Papiano to the minor children of defendant, while the children were living with the defendant upon the land in dispute and long after the adverse possession of defendant had commenced to run, would have the effect of arresting the running of the statute. The evidence was in sharp conflict but the trial court, sitting in lieu of a jury, was clothed with authority to hear and weigh the evidence, and while a greater number of witnesses testified for the plaintiff than for the defendant the trial court believed the testimony of defendant's witnesses and the decision cannot be disturbed for that reason. In all cases where the defense of adverse possession is interposed the character of the possession is a question for the jury. See 1 R. C. L. p. 757. The evidence of the witnesses for the defense in this case is to the effect that the defendant took the property from Mahiai, from whom she claims to have deraigned title, in 1889, two years prior to the date of the deed to the children. The defendant has possessed and claimed the property ever since and the statute of limitations has been running in her favor. We hold that the mere delivery of the deed to the children did not destroy the continuity of defendant's possession nor have the effect of tolling the bar of the statute.

All additional questions raised by plaintiff's exceptions have been duly considered and are found without merit sufficient to warrant a reversal of the trial court.

Plaintiff's exceptions are overruled.

Robertson, C.J., concurring.

*W. L. Stanley and C. H. Olson (Holmes & Olson and P. R. Bartlett with them on the brief) for plaintiff.*

*N. W. Aluli (E. K. Aiu with him on the brief) for defendant.*

CONCURRING OPINION OF ROBERTSON, C.J.

If the appellant had raised and urged the point that the decision of the circuit court was erroneous on the ground that the reasons for its conclusion were not set forth as required by section 2380 of the Revised Laws I think it should have been sustained, but as the point has been waived this court must proceed on the assumption that all disputed facts were decided by the court below in favor of the defendant. But on behalf of the plaintiff it is contended that taking all disputed facts as resolved against the plaintiff it still remains that as matter of law title in the defendant by adverse possession was not established because it appears by undisputed testimony that the possession of the defendant was lacking in the essential element of exclusiveness as the defendant's two minor children to whom the legal title to the land in dispute was conveyed in 1891 lived on the land in joint occupancy with their mother, and as to the daughter, Papaenaena, who, while still a minor, went elsewhere to reside, her possession was maintained by her father, Pililaau, who was appointed the legal guardian of her property (as well as of her sister's) and who continued in joint occupancy of the premises with his wife, the defendant. The question of adverse possession is usually a mixed one of law and fact, but where, as here, the point is as to the sufficiency of admitted or undisputed facts to prove the title claimed, it is a question of law. *Kaaihue v. Crabbe*, 3 Haw. 768, 774; 2 C. J. 279, *et seq.*

It is elementary that in order that an adverse posses-

Robertson, C.J., concurring.

sion may ripen into title it must, among other things, have been exclusive and uninterrupted for the statutory period. There was evidence to support the defendant's contention that the deeds from Papiano to Mahiai and Kaulehua, and from Mahiai to herself, both dated April 15, 1889, were intended to convey the makai portion of the kuleana; and that ever since the date of her deed the defendant had occupied the makai lot under claim of title in herself. Under that theory the statute of limitations began to run from the date of the deed, and a right of action at once accrued to Papiano. In 1891, Papiano, on his death bed, executed the deed conveying the legal title to the makai lot to the two children who were living there with their mother. Was the mother's adverse possession thereby interrupted or its exclusiveness destroyed? In order to have either effect there must have been a claim of title and exercise of dominion, but the infants were incapable of asserting such on their own behalf or of understanding their rights in the premises. It may seem as though the law ought to protect them in their helplessness but the rule is settled otherwise. The rule that "when the statute once begins to run it will continue unless there is a saving qualification in the statute" (25 Cyc. 1267), applies to actions for the recovery of land as well as to personal actions. *Wire v. Waialua Agr. Co.* 18 Haw. 662. In that case the owner of land had died disseised leaving minor heirs, and the contention was advanced that the heirs had five years after reaching majority in which to bring action. This court held that the statute continued to run notwithstanding that the heirs were minors. The principle applies here. The two children (plaintiff's grantors) became of age respectively on January 12, 1906, and March 29, 1907. This action was commenced on April 9, 1915, and the contention is that the statute cannot be regarded as having commenced to run before the children had respectively

Robertson, C.J., concurring.

reached majority, and that the full period of ten years thereafter was available. That view cannot be sustained. The defendant's adverse possession commenced to run on April 15, 1889, and ripened into title ten years thereafter and about two years before Pililaau was appointed guardian of the children. Section 2654 of the Revised Laws, providing that "If, when such right of entry or of action shall first accrue as aforesaid, the person entitled to such entry or action shall be within the age of twenty years \* \* \* such person, or any one claiming from, by or under him, may make the entry or bring the action at any time within five years after such disability shall be removed, notwithstanding the ten years before limited in that behalf, shall have expired," does not apply because at the time the right of action accrued the owner of the legal title was under no disability. Nor, I think, does the general rule that the possession by a parent of his child's land will not be deemed adverse to the child (2 C. J. 156), relied on by the appellant, apply to a case where the statute has already begun to run against the child's predecessor in title.

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K. HAMANO *v.* S. MIYAKE.

No. 1027.

RESERVED QUESTIONS FROM CIRCUIT COURT, FIFTH CIRCUIT.

HON. L. A. DICKEY, JUDGE.

SUBMITTED JULY 23, 1917.

DECIDED AUGUST 1, 1917.

ROBERTSON, C.J., QUARLES AND COKE, JJ.

STATUTES—*amendment—effect.*

When a statute is amended "to read as follows," those parts which are omitted are repealed and new provisions take effect at the time the statute as amended becomes operative (Following *Weinzheimer v. Lufkin*, 22 Haw. 183).

SAME—*same—presumption as to oversight.*

Courts will not presume an oversight on the part of the legislature in the enactment of an amendatory statute where such presumption is avoidable.

TRIAL—*words and phrases.*

The word "trial" as used in Sec. 2270 R. L. as amended by Act 49 S. L. 1917, means a trial on the merits—the examination of the evidence for the purpose of determining the issues of fact between the parties, and does not include the hearing of an appeal from a district court solely on points of law.

## OPINION OF THE COURT BY QUARLES, J.

This is an action of assumpsit instituted in the district court of Lihue, County of Kauai, wherein the cause was determined. An appeal has been prosecuted by the defendant on points of law to the circuit court of the fifth judicial circuit from the judgment of the district court in the action. The defendant moved in the circuit court to have the case set for hearing, which motion was opposed on the ground that Act 49 of the Laws of 1917 deprives the court of jurisdiction to try any term case before the second Wednesday in January, 1918, unless a special

## Opinion of the Court.

term be called. The circuit court has expressed its willingness to hear the case at an early date, if authorized so to do. The circuit court being in doubt as to its right to proceed in the cause has reserved to this court the following questions:

(1) "Is there now continuing any regular term of the circuit court of the fifth circuit, Territory of Hawaii, or will there be none held until the second Wednesday of January, 1918?"

(2) "Does the term 'trial' in section 2270 of the Revised Laws of 1915 as amended by Act 49 of the Session Laws of 1917 include hearings in cases brought to the circuit court of the fifth circuit from a district magistrate by appeals solely on points of law?"

Prior to April 3, 1917, by statute (Sec. 2268 R. L.) terms of court in the fifth circuit at Lihue were fixed on the first Wednesdays of March, July and November. This section, as amended by Act 49, S. L. 1917, now provides that terms of court shall be held "in the fifth circuit, at Lihue, on the second Wednesday of January," thus making a continuing term for the year. This amendment was approved April 3, 1917. The provisions in the old statute as to the three terms in the fifth circuit commencing on the first Wednesdays of March, July and November, being omitted in the amendatory statute, are repealed and the new provisions became effective at the date of its approval, April 3, 1917 (*Weinzheimer v. Lufkin*, 22 Haw. 183). This statute does not in terms nor by implication revert back to the first Wednesday in January, 1917, hence, under the law as it now exists, there is no authority for calling or holding the July or November term provided by the statute prior to its amendment. This may have been an oversight on the part of the legislature as it would have been an easy matter to have provided in the amendatory statute that from the date of its approval the fifth circuit court should be in continuous session during the remainder of

## Opinion of the Court.

the year 1917, or to have provided that the provisions of the amendatory act should take effect in the fifth circuit at the beginning of the year 1918. Courts will not presume an oversight on the part of the legislature where such presumption is avoidable. There is reason for concluding that the legislature acted advisedly in the enactment of the amendatory statute in question, as by the provisions of section 2269 R. L. "Any circuit judge may, with the written approval of the chief justice, appoint special terms of his court, at other times, whenever he shall deem it essential to the promotion of justice." We are therefore forced to the conclusion that there is not now a continuing term of the circuit court of the fifth circuit; and that the court during the remainder of this year can only be convened in special term by the provision of section 2269 R. L., under which provision the court can readily dispatch any necessary business in the cause of justice.

The answer to the second reserved question must depend upon the construction of the word "trial" as used in the amendatory statute. The statute (Sec. 2270 R. L.), before and since the amendment, provides that "no trial in any term case shall be had in July and August." At common law the word "trial" meant the examination of the evidence and decision upon issues of fact. Bouvier in his law dictionary, following the rule announced in *United States v. Curtis*, 4 Mason 232, Fed. Cas. No. 14,905, defines the word "trial" as follows: "The examination before a competent tribunal, according to the laws of the land, of the facts put in issue in a cause, for the purpose of determining such issues." This definition is substantially that given by early common law writers (3 Blackstone, Commentaries, 330; Stephen's Pleading 77—3 Am. ed. 114 and appendix thereto, note 30). See also *Hitchcock v. First Judge*, 14 Haw. 1, 4. Under many statutes, owing to the phraseology used, the word "trial" has been held to em-



## Opinion of the Court.

brace either, or both, questions of law and of fact. The provision in section 2540 R. L., allowing an attorney's fee of three dollars "for attending upon the trial of any cause" has repeatedly been held in this court as not allowable upon a hearing on appeal, the same not being a trial within the meaning of the language used in the statute last named. In our opinion the word "trial," as used in the amendatory statute in question here, relates to the trial of the issues of fact, upon the merits, and not to questions of law not raised upon the trial of the case on its merits, in term cases. We are of the opinion that the legislature in the amendatory statute under consideration used the word "trial" in its limited or common law sense and not in its general sense. The legislature must have intended that the trial prohibited was the trial upon the merits of the case where the issues of fact are settled, and not to a hearing on an appeal upon points of law. The circuit court has concurrent jurisdiction with this court in appeals upon points of law from a district magistrate and in such appeals it could not reasonably be contended that this court tries the case or does anything more than to review the trial had in the district court for the purpose of ascertaining whether or not an error of law was committed. Consequently the circuit court of the fifth circuit has jurisdiction to hear, during July and August, at a special term properly called in accordance with section 2269 R. L., an appeal from the district court upon points of law.

The circuit court of the fifth judicial circuit is advised that there is now no continuing term of such court in the fifth judicial circuit and no provision of law by which a regular term thereof may be held during the remainder of the present year, and any term held in said circuit must be held under the provisions of section 2269 R. L. And the circuit court is further advised that the term "trial"

## Syllabus.

in section 2270 of the Revised Laws of 1915, as amended by Act 49 of the Session Laws of 1917, does not include the hearing of an appeal to the circuit court from a district magistrate solely on points of law.

*Fred Patterson* for plaintiff.

*S. K. Kaeo* for defendant.

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F. E. THOMPSON *v.* THOMAS GILL, DEFENDANT,  
AND JAMES BICKNELL, AUDITOR OF THE  
CITY AND COUNTY OF HONOLULU, GAR-  
NISHEE.

No. 1026.

APPEAL FROM DISTRICT MAGISTRATE OF HONOLULU.

ARGUED OCTOBER 15, 1917.

DECIDED OCTOBER 18, 1917.

ROBERTSON, C.J., QUARLES, J., AND CIRCUIT JUDGE KEMP  
IN PLACE OF COKE, J., ABSENT.

GARNISHMENT—*property subject to attachment.*

A warrant for the salary of a government beneficiary issuable to a judgment creditor under a garnishment order is not exempt from attachment in another garnishment proceeding upon the ground that it is property *in custodia legis*.

SAME—*same.*

The fact that by an agreement between the owner of a judgment obtained by garnishment against a government beneficiary and his attorneys the latter were to receive a certain percentage of the sum recovered, the judgment not having been assigned, would not prevent the attachment of the salary warrant in another garnishment proceeding by a creditor of the owner of the judgment, if the proceeding could otherwise be maintained.

SAME—*statutory attorney's fees.*

Statutory attorney's fees in assumpsit cases are taxed as part of

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the judgment, and as between the owner of the judgment and his creditors belong to him, and not his attorneys.

**SAME—attachment of debts on application of judgment creditor.**

In order to sustain a garnishment under section 2808 of the Revised Laws the applicant must show that he is a judgment creditor or has succeeded to the rights of a judgment creditor under a valid judgment.

**DISTRICT MAGISTRATES—pleadings in district courts.**

The rule which dispenses with rigid forms of pleading in the district courts does not obviate the necessity of stating all the essential facts required to entitle one to a special order in a statutory proceeding.

## OPINION OF THE COURT BY ROBERTSON, C.J.

This is an appeal from an order made by the district court of Honolulu on May 10, 1917, whereby the garnishee was directed to pay to the plaintiff the sum of \$48.34 then "in the hands of the garnishee" and payable at the order of court on behalf of the defendant Gill on account of a judgment theretofore obtained by him against one Ohrt, and the further sum of \$9.75 then due and payable to the defendant by the city and county for jury fees. The plaintiff filed a sworn petition in the court below alleging that on November 9, 1914, one Byrne obtained judgment against Gill in the sum of \$320.10, which had been partly satisfied, but on which the sum of \$195.72 was still due and owing; and that Bicknell, the auditor of the city and county, was the debtor of the defendant. It was also alleged that "on the 9th day of May, A. D. 1915, the said plaintiff, J. J. Byrne, deceased, and under the last will and testament of the said J. J. Byrne, deceased, the plaintiff herein was named as the sole heir of the said J. J. Byrne, deceased, and by virtue of said last will and testament, the plaintiff herein is now the owner and holder of said judgment aforesaid." The petitioner prayed for an order attaching all debts owing or accruing from the garnishee to the defendant

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to answer the debt alleged to be due the plaintiff. It appeared that the salary of Ohrt had been garnisheed by Gill as that of a government beneficiary, and a preliminary order was made in this case directing Bicknell, as auditor, to hold any warrant for the salary of Ohrt in the sum of \$48.34, the amount payable under the garnishee order to satisfy the judgment in the prior case, subject to the order of the court in this proceeding. Then application was made by the plaintiff for the examination of the defendant as a judgment debtor under the provisions of section 2807 of the Revised Laws. The defendant was summoned and examined, and his counsel moved that the application for a final order against the garnishee be quashed on several grounds. The motion was denied, and the order appealed from entered. The garnishee was not summoned to appear and show cause as the statute requires.

This appeal has been brought upon four points of law. Under the second point it is argued that salary warrants held by order of court under a garnishment order are *in custodia legis*, and therefore, not subject to further garnishment proceedings. But the status of the garnishee in an action against a government beneficiary is not that of an officer of the court, but of a party to the action. In case the plaintiff obtains judgment, it becomes the duty of the garnishee, upon being given proper notice, to issue his warrant or warrants to the extent necessary to satisfy the judgment directly to the plaintiff in the action. R. L. 1915, Sec. 2830. Such warrants do not go through the hands of the court and cannot be regarded as *in custodia legis*. Under the third and fourth points it is contended that twenty-five per cent of the amount recovered in the prior case belonged to Gill's attorneys by reason of a contract made between them and Gill for their compensation, and that so much of the judgment against Ohrt as consisted of attorney's fees allowed by statute (R. L. 1915,

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Sec. 2547) also belonged to the attorneys, and, therefore, could not be attached by a judgment creditor of Gill as moneys belonging to him. We do not sustain these contentions. As between the parties to this proceeding the amount of the judgment against Ohrt was payable to Gill or whoever might legally stand in Gill's place. No part of the judgment had been assigned by Gill to his attorneys. And the statutory attorney's fees which were taxed in that case became payable to Gill as part of the judgment. Whatever claims or rights the attorneys may have in the premises are solely against their client.

The appellant's contention under the first point, that in order to sustain a garnishment order under section 2808 of the Revised Laws the application must show the existence of a valid judgment in favor of the applicant, is sustained. Counsel for the appellee contend that under the liberality permitted with reference to pleadings in district courts the statement in the petition which is quoted above sufficiently shows that the plaintiff is the owner of the Byrne judgment. But the rule which dispenses with rigid forms of pleading in the district courts does not obviate the necessity of stating all the essential facts required to entitle one to a special order in a statutory proceeding such as this. The statute provides for the making of an application by a "judgment creditor." Byrne was the judgment creditor, and in order to enable Thompson to maintain the proceeding it was incumbent upon him to show that he had succeeded to Byrne's rights under the judgment. The death of Byrne, testate, was alleged, and that Thompson was named in the will as sole "heir." It was not alleged that the will had been admitted to probate, but if it had been, the executor, and not the beneficiary named in the will, would have been the proper party to institute the proceeding. It may be that the estate had been settled and that the plaintiff claims under an order

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of distribution, but there was neither allegation nor proof that such was the case. The defect in this respect was not merely technical. It is quite possible that the administration of the estate has not been closed and that there are claims of creditors still unsettled. We hold that the allegation that the plaintiff is the owner of the judgment "by virtue of said last will and testament" was not sufficient to show a right or title on the part of the plaintiff to have the order which he sought and obtained. On behalf of the appellee two New York cases are cited. In *Secley v. Connors*, 95 N. Y. S. 1109, it was held that an allegation that the "said judgment was duly assigned" to the applicant was sufficient, the fact not being controverted. The case of *Kemp v. Gartenberg*, 156 N. Y. S. 883, is more like the case at bar. There, it appeared in the movant's affidavit that the judgment had been assigned to a third party, and the motion was denied. The court held, citing other cases, that "the affidavit must nevertheless state who owns the judgment if it has been transferred, and how the applicant came to own it, whether by assignment or operation of law, so that it may appear that the proceedings are in fact brought by the real party in interest," and that where an assignee of a judgment seeks to examine a judgment debtor "he must show in his affidavit that he has a right to proceed upon the judgment and move in the matter." In the case at bar timely objection was raised as to the sufficiency of the allegations to enable Thompson to maintain the proceeding. In granting the order upon the showing made the district magistrate erred.

Argument was heard upon the questions whether the sum payable to Gill out of Ohrt's salary under the garnishment order in the prior case was a "debt" so as to be attachable under the statute (*Lee Ah Sue v. Chu Kee*, 6 Haw. 623) and, if so, whether the debtor was Bicknell, as auditor, or the municipality itself, but as these points, though important, were not specifically raised by the

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appeal we shall not pass on them. *Territory v. Schaefer*, 19 Haw. 214, 218.

The order appealed from is reversed, and the case remanded for further proceedings by way of amendment or otherwise consistently with the views herein expressed.

*C. S. Franklin* (*Thompson & Cathcart* with him on the brief) for plaintiff.

*G. S. Curry* and *C. S. Davis* for defendant.

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IN THE MATTER OF THE PETITION OF MANUEL OLIVIERI SANCHEZ FOR A WRIT OF MANDAMUS AGAINST DAVID KALAUOKALANI, CLERK OF THE CITY AND COUNTY OF HONOLULU, TERRITORY OF HAWAII.

No. 1024.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.  
HON. S. B. KEMP, JUDGE.

ARGUED OCTOBER 16, 1917.

DECIDED OCTOBER 22, 1917.

ROBERTSON, C.J., QUARLES, J., AND CIRCUIT JUDGE ASHFORD  
IN PLACE OF COKE, J., ABSENT.

TREATIES—*statutes*—*citizens*—*transfer of allegiance*.

By the provisions of the treaty of Paris a Spanish subject residing in Porto Rico on April 11, 1899, and who continued to reside there for one year thereafter and did not make a declaration before a court of record of his decision to preserve his allegiance to the crown of Spain, became an American subject, and was, under the provisions of the act of Congress of April 12, 1900, a citizen of Porto Rico and did not lose his political status by removing in 1901 from Porto Rico to Hawaii.

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**CITIZENS—elections—registration of voters.**

A native of Porto Rico who was an inhabitant thereof on the eleventh day of April, 1899, and continuously resided there until the summer of 1901, after which he continuously resided in the Territory of Hawaii, claiming at all times after April 11, 1899, to be a subject of the Republic of the United States, was, at the passage of the act of Congress of March 2, 1917, to provide a civil government for Porto Rico and for other purposes, a citizen of Porto Rico as defined by section 7 of the act of Congress of April 12, 1900, and is, by the provisions of section 5 of said act of March 2, 1917, deemed and declared to be a citizen of the United States.

**MANDAMUS—right to be registered as a voter.**

A citizen of the United States who has resided in the city and county of Honolulu for more than one year next preceding his application to be enrolled in the great register of such municipality as a voter has the right to such registration, and when such right is denied him by the officer whose duty it is to register him he is entitled to a writ of mandamus to enforce such right.

**APPEAL AND ERROR—moot question—elections—mandamus.**

The election laws provide for a permanent registration of voters; the right of registration of one entitled thereto is a continuing one; and when this right is sought to be enforced by mandamus the issue raised by a return to the alternative writ does not become a moot question by the happening of a primary election held soon after the proceedings for mandamus were instituted.

## OPINION OF THE COURT BY QUARLES, J.

The petitioner filed his petition for a writ of mandamus directed to the respondent as clerk of the city and county of Honolulu commanding and directing said respondent to register and enter upon the great register of the city and county of Honolulu the name of the petitioner as a voter in the said city and county, in the circuit court of the first judicial circuit. An alternative writ of mandamus issued as demanded and to said writ the respondent made return. From the alternative writ and from oral evidence heard at the hearing upon the return to the writ the following undisputed facts appear: The petitioner was born in Yauco, Porto Rico, January 20, 1888, of parents who were natives



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of Porto Rico; petitioner's father was at the time of and after the cession of Porto Rico to the United States by the treaty of Paris a resident of Porto Rico and held the office of mayor of a town in Porto Rico as late as July, 1900; petitioner's father died in Porto Rico and thereafter petitioner, then nearly thirteen years and seven months old, left Porto Rico with his mother and came to the Territory of Hawaii, arriving here on the twenty-second day of September, 1901, since which time the petitioner has resided in the Territory of Hawaii, and during the last four years has resided in the city and county of Honolulu; neither the petitioner nor his father elected to retain allegiance to the crown of Spain under the provisions of the treaty of Paris but at all times after the ratification of that treaty claimed to be American subjects; on the eleventh day of April of the present year the petitioner applied in person to the respondent as clerk of the city and county of Honolulu to be enrolled upon the great register of the city and county of Honolulu as a voter, but respondent as such clerk refused to register the petitioner as a voter, claiming that under the facts above stated the petitioner was not and is not a citizen of the United States and therefore not entitled to register as a voter. These facts appear in the alternative writ issued out of the circuit court of the first circuit and are not traversed in the return, but in the return the respondent claims that under the provisions of the treaty of Paris and subsequent legislation of Congress the petitioner is not a citizen of the United States and therefore not entitled to be registered as a voter in the city and county of Honolulu, Territory of Hawaii. Upon hearing the return to the alternative writ the circuit court denied the peremptory writ of mandamus demanded, dismissed the alternative writ and discharged the respondent with costs. From the

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judgment, and to reverse the same, the petitioner has appealed to this court.

The questions to be decided here are purely questions of law and involve the application of the provisions of articles II and IX of the treaty of peace between Spain and the United States ratified April 11, 1899; section 7 of the act of Congress of April 12, 1900 (31 Stat. L. p. 79); and section 5 of the act of Congress of March 2, 1917 (39 Stat. L. p. 953). Articles II and IX of the treaty with Spain read as follows:

“Spain cedes to the United States the Island of Porto Rico and other islands now under Spanish sovereignty in the West Indies, and the Island of Guam in the Marianas or Ladrones” (Art. II).

“Spanish subjects, natives of the Peninsula, residing in the Territory over which Spain by the present treaty relinquishes or cedes her sovereignty, may remain in such territory or may remove therefrom, retaining in either event all their rights of property, including the right to sell or dispose of such property or of its proceeds; and they shall also have the right to carry on their industry, commerce and professions, being subject in respect thereof to such laws as are applicable to other foreigners. In case they remain in the territory they may preserve their allegiance to the Crown of Spain by making, before a court of record, within a year from the date of the exchange of ratifications of this treaty, a declaration of their decision to preserve such allegiance; in default of which declaration they shall be held to have renounced it and to have adopted the nationality of the territory in which they may reside.

“The civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by the Congress” (Art. IX).

Section 7 of the act of Congress of April 12, 1900, is as follows:

“That all inhabitants continuing to reside therein who were Spanish subjects on the eleventh day of April,

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eighteen hundred and ninety-nine, and then resided in Porto Rico, and their children born subsequent thereto, shall be deemed and held to be citizens of Porto Rico, and as such entitled to the protection of the United States, except such as shall have elected to preserve their allegiance to the Crown of Spain on or before the eleventh day of April, nineteen hundred, in accordance with the provisions of the treaty of peace between the United States and Spain entered into on the eleventh day of April, eighteen hundred and ninety-nine; and they, together with such citizens of the United States as may reside in Porto Rico, shall constitute a body politic under the name of The People of Porto Rico, with governmental powers as hereinafter conferred, and with power to sue and be sued as such."

Section 5 of the act of Congress of March 2, 1917, is as follows:

"That all citizens of Porto Rico, as defined by section seven of the Act of April twelfth, nineteen hundred, 'temporarily to provide revenues and a civil government for Porto Rico, and for other purposes,' and all natives of Porto Rico who were temporarily absent from that island on April eleventh, eighteen hundred and ninety-nine, and have since returned and are permanently residing in that island, and are not citizens of any foreign country, are hereby declared, and shall be deemed and held to be, citizens of the United States: *Provided*, That any person hereinbefore described may retain his present political status by making a declaration, under oath, of his decision to do so within six months of the taking effect of this Act before the district court in the district in which he resides, the declaration to be in form as follows:

" 'I, . . . . ., being duly sworn, hereby declare my intention not to become a citizen of the United States as provided in the Act of Congress conferring United States citizenship upon citizens of Porto Rico and certain natives permanently residing in said island.'

"In the case of any such person who may be absent from the island during said six months the term of this proviso may be availed of by transmitting a declaration, under

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oath, in the form herein provided within six months of the taking effect of this Act to the executive secretary of Porto Rico: *And provided further*, That any person who is born in Porto Rico of an alien parent and is permanently residing in that island may, if of full age, within six months of the taking effect of this Act, or if a minor, upon reaching his majority or within one year thereafter, make a sworn declaration of allegiance to the United States before the United States District Court for Porto Rico, setting forth therein all the facts connected with his or her birth and residence in Porto Rico and accompanying due proof thereof, and from and after the making of such declaration shall be considered to be a citizen of the United States."

By said treaty it was the intent of both contracting parties to transfer to the United States all sovereignty in Porto Rico and other islands therein named and to give to the inhabitants of Porto Rico, then and theretofore subjects of Spain, the right to determine for themselves whether they would remain subjects of Spain or become subjects of the United States. In order to retain their allegiance to the crown of Spain it was provided that those so desiring should within one year make before a court of record a declaration of their decision to preserve allegiance to the crown of Spain, and upon failure to make such declaration within such time they should be held to have renounced such allegiance and to have adopted the nationality of the Territory in which they might reside. By virtue of the provisions of this treaty the petitioner's father and the petitioner must be held to have renounced their allegiance to the crown of Spain and to have adopted the nationality of the American republic to which they had been attached, as neither the petitioner nor his father made the declaration required to preserve, under the terms of the treaty, his allegiance to the crown of Spain. It is thus seen that at the expiration of one year from the ratification of the said treaty, to wit, from April 12, 1900,

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the political status of the father of petitioner and of the petitioner was fixed; they were on April 11, 1899, Spanish subjects and they resided in Porto Rico; they remained in Porto Rico until the expiration of the year and elected to renounce their Spanish allegiance and adopt the nationality of the United States, and thereby became citizens of Porto Rico as defined by the said act of April 12, 1900. So far, and up to the time that petitioner left Porto Rico and came to Hawaii, there has been no change in his political status and he was then a citizen of Porto Rico, and at all times since April 12, 1900, the petitioner has been a subject of the United States and was not a Spanish subject, and this political status existed at the time of the enactment and taking effect of the act of Congress of March 2, 1917. By the terms of the latter act it is expressly declared that all citizens of Porto Rico "as defined by section seven of the Act of April twelfth, nineteen hundred" shall be deemed and held to be citizens of the United States. There is nothing in the act showing an intent to exclude from its operation persons who are, by the definition found in section 7 of the act of 1900, citizens of Porto Rico, but who were at the date of the act of March 2, 1917, absent from Porto Rico. The first proviso found in section 5 of the act last named, wherein it is provided "that any person hereinbefore described may preserve his present political status" by making the declaration therein prescribed, applies to those inhabitants of Porto Rico who were absent from Porto Rico at the date of the ratification of the treaty with Spain but thereafter returned to Porto Rico, and they were given the opportunity of preserving their allegiance to the crown of Spain by making the declaration therein prescribed. It is possible that this proviso may have been intended to confer upon citizens of Porto Rico the right to reject full-fledged citizenship, and remain merely American subjects, but it is not necessary to, and

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we do not, decide this point. The language, "are hereby declared, and shall be deemed and held to be, citizens of the United States" used by Congress, shows the intent to immediately invest citizens of Porto Rico with United States citizenship, and there is no claim that the petitioner ever exercised the option (if it was given him) to reject the citizenship conferred by the act, but the contrary does appear. Our attention has not been called to any decision applying the provisions of the said treaty and statutes to a case like the one before us. The decision in *Vallejos v. United States*, 35 Ct. Cl. 489, is based upon treaty provisions unlike those in question here, and is easily distinguished from the case at bar.

We hold that by virtue of the provision of section 5 of the act of Congress of March 2, 1917, the petitioner became a full-fledged citizen of the United States at the time that the said act went into effect, and as he has resided in the Territory of Hawaii and in the city and county of Honolulu for more than one year prior to his application to be registered he was entitled to have his name enrolled upon the great register of the city and county of Honolulu as a voter, and that it was and is the duty of the respondent to so enroll and register the petitioner. This duty is a ministerial one which may be enforced by mandamus. The alternative writ was erroneously dismissed and the peremptory writ demanded should have been granted and issued.

It is argued on behalf of the respondent that inasmuch as the primary election, which took place soon after the application of the petitioner to be registered was denied, has since taken place, that the right of the petitioner to be registered has become a moot question, for which reason this appeal should be dismissed. We cannot accept this view. The election laws of Hawaii provide for permanent registration and the application of the petitioner was for

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such registration and his right to the remedy herein sought is a continuing one and did not expire with the holding of the primary election mentioned.

The judgment denying the permanent writ of mandamus demanded and dismissing the alternative writ is reversed and the cause remanded to the circuit judge for further proceedings consistent with the views herein expressed.

*J. B. Lightfoot* (*Lightfoot & Lightfoot* on the brief) for petitioner.

*A. M. Cristy*, First Deputy City and County Attorney (*A. M. Brown*, City and County Attorney, with him on the brief) for respondent.

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DENISE MAHAN BEALL v. GRAFTON A. BEALL.

No. 1039.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

HON. S. B. KEMP, JUDGE.

ARGUED OCTOBER 23, 1917.

DECIDED OCTOBER 30, 1917.

ROBERTSON, C.J., QUARLES, J., AND CIRCUIT JUDGE HEEN  
IN PLACE OF COKE, J., ABSENT.

JUDGMENT—*divorce—opening default.*

The technical law of default does not apply to an action of divorce and where there has been an *ex parte* hearing and a decree of divorce in favor of the libellant the default should be opened, the decree set aside and the defendant permitted to defend on the showing made in this case as set forth in the opinion, although the showing might not be sufficient in an ordinary action.

SAME—*same—same.*

The libellee in a divorce case was served out of the jurisdiction

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of the court; a decree of divorce rendered against him on *ex parte* hearing; a motion to open the default and set aside the decree was promptly made, the motion being supported by affidavit showing that the libellee was anxious to defend and had cabled his attorney to appear for him, but owing to the temporary absence of his attorney libellee was not represented at the hearing; the affidavit also showed that the libellee denied nearly all the allegations of the libel and attempted to explain the others: Held, that the motion should have been sustained and it was an abuse of discretion to deny the same.

## OPINION OF THE COURT BY QUARLES, J.

The libellant, appellee here, filed in the circuit court of the first circuit on November 8, 1916, a libel for divorce from her husband, the libellee, appellant here, upon the sole ground of desertion alleged to have occurred on the 7th day of November, 1914. In said libel it is alleged that the "libellee is without the Territory of Hawaii, the exact whereabouts of which to your libellant is unknown, but that libellant is informed and believes, and upon information and belief avers the fact to be that said libellee is detailed on the U. S. S. 'Yorktown,' cruising near the southern coast of the State of California; that all mail matter for persons so detailed is directed care of and forwarded to the addressee by the postmaster at San Francisco, California, to whom the exact whereabouts of said Yorktown is from time to time communicated." Thereupon the circuit judge made an order directing that copies of the libel, summons and order for service be made upon the libellee by mailing in a registered envelope sealed and properly stamped to the libellee on the U. S. S. Yorktown in care of the postmaster of the city and county of San Francisco, State of California, said registered envelope to contain thereon the words: "Return receipt demanded" "Deliver only to addressee," and the address of the clerk as sender, and said order fixed Thursday, February 13,



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1917, at nine o'clock a. m. as the day and hour for hearing. Pursuant to this order copies of the libel, summons and order for service were mailed as directed, and which the libellee received on board the U. S. S. Yorktown December 10, 1916. Thereafter a special appearance was made to this libel by the libellee, who, appearing specially therefor by his attorney C. S. Davis, Esq., filed a plea to the jurisdiction of the circuit judge upon various grounds based upon irregularities in the summons and order for service. Thereafter the libellant filed another libel against the libellee in the same court, alleging the same ground and the additional ground of extreme cruelty committed by certain acts therein alleged, and another order directing that service of the libel and summons thereon be made upon the defendant personally at San Diego, California, by the sheriff of San Diego county or other proper officer, was made by the circuit judge and service so made March 23, 1917. May 11, 1917, was named as the date for the hearing of the last libel. This last libel bears the exact docket number and register page as the former libel. There is nothing in the record showing that the first libel was discontinued, but the fact that it was not discontinued either before or after filing the second libel is inferable from the record before us. May 7, 1917, the libellee wrote to his attorney, C. S. Davis, Esq., and in his letter denied the charge of desertion, denied nearly all of the acts alleged to show cruel treatment by himself of the libellant, and attempted to explain those not denied. If the facts stated in his letter should be established they could be regarded as constituting a defense to the second libel filed against him as well as showing that he was then a United States naval officer on duty at sea and had no control of his movements while at sea. This letter was forwarded to his said attorney by mail but did not reach him until on or about the 22d day of May, 1917. On the 9th day of

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May, 1917, the libellee sent to his said attorney at Honolulu a cable asking him to appear and request delay and saying that he had written a complete traverse to the libel, evidently referring to the letter of May 7, before mentioned. This cablegram was received at the office of C. S. Davis, Esq., at Honolulu on the 10th day of May, 1917, but said Davis was then in Hilo, having left for Hilo the day preceding on business. This cable was taken to Hilo by the father of C. S. Davis and delivered to him on May 11, 1917, whereupon he immediately sent a wireless to the attorneys for libellant asking about the libel, but was informed by answer that the same had been heard and a divorce granted to the libellant. On May 11, 1917, the libellant appeared before the proper circuit judge, asked and was granted an order of default against the libellee, whereupon an *ex parte* hearing was had, evidence was heard on behalf of the libellant and a decree there and then entered divorcing the parties and awarding to the libellant the care of the two minor children, allowing the libellant counsel fees in the sum of one hundred dollars, allowing libellant seventy-five dollars per month for the support of her minor children, and fifty dollars per month permanent alimony for herself, payable monthly. May 18, 1917, the libellee by said attorney filed a motion to open the default and set aside the decree of divorce and permit the libellee to defend, stating therein the facts as to sending and receiving the said cablegram, and further showing in said affidavit that said attorney was expecting to receive by mail from the libellee a statement of the facts touching his defense and would file an additional affidavit setting forth the facts relating to such defense. Thereafter and on May 25, 1917, the libellee by his said attorney filed such additional affidavit in which was copied the statements heretofore referred to as made in the letter of

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libellee to his said attorney of May 7, 1917. It also appeared in the affidavit of said C. S. Davis that soon after filing the plea to the jurisdiction of the court by reason of irregularities in the summons that issued on the first libel and the order of service thereon he had a conversation with the senior member of the firm of Thompson, Milverton & Cathcart, who filed the said libel as attorneys for the libellant and that in such conversation said attorney for the libellant told affiant that he desired to take no chances with the aforesaid plea to the jurisdiction and that they (attorneys for libellant) would file or were about to file or had filed the second libel on behalf of the libellant and that he or one of the members of the firm would see that affiant was notified of the date fixed for the hearing on the second libel; that said attorney for libellee relied upon such statement and paid no further attention and made no further endeavor to find out when the second libel was fixed for hearing and that he had not received any information as to such time of hearing until he received the said cablegram from the libellee. At the hearing of the motion, upon suggestion of the circuit judge, a cablegram was sent to the senior member of the firm of attorneys representing the libellant, then absent from Hawaii, and he answered thereto by cable, saying: "Made no promise Davis to advise hearing second libel Beall case." From an order denying the motion to reopen the case the libellee has appealed.

The general rule is that applications to open defaults are addressed to the sound discretion of the trial court and such discretion will not be disturbed except in case of clear abuse thereof. This is the rule in ordinary actions where the only parties interested are the parties to the litigation. Query: Should the same rule apply to divorce cases?

The granting of divorces is opposed to the interests of

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society and is against public policy except when the ground or grounds prescribed by the statute exist and are clearly proven. This policy is found in various portions of our statutes relating to divorce. For instance, our statutes provide (1) that hearings on divorce shall be public; (2) that the libellant must have lived in the Territory for two years next preceding the application; (3) the case shall not be tried until at least thirty days after personal service has been made on the libellee when his place of residence is known; (4) exact legal proof is required upon every point notwithstanding the consent of parties; (5) the admission of the respondent or libellee shall not be competent evidence except to prove the original marriage; and (6) the divorce must be denied when there is collusion between the parties. (R. L. 1915, Secs. 2927, 2928, 2931, 2933.) The last section referred to provides: "If there be any reason to suspect collusion, or that important testimony may be procured which has not been produced, it shall be the duty of the judge to continue the cause from time to time while such reason for suspicion continues, and the attorney general or other prosecuting officer and parties not of record shall be heard, to establish the fact of collusion or of the existence of testimony not produced." Those statutory provisions are here referred to for the purpose of showing that divorce actions are not on the same plane as ordinary civil actions, and as heretofore held by this court (*Mitchell v. Mitchell*, 5 Haw. 161) the technical law of default does not apply to an action or suit for divorce. Under this rule and the statutory provisions referred to we think it reasonably follows that the trial judge has not the same discretion in refusing to set aside a default and decree of divorce that he has in ordinary cases and that the showing in a divorce case which would authorize opening the default might not be sufficient in an ordinary case where the public is not

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interested. In the case of *Wadsworth v. Wadsworth*, 81 Cal. 182, 15 Am. St. Rep. 38, the court reversed the action of the lower court in refusing to set aside a default, although it was admitted that the appellant had been guilty of such negligence as would in an ordinary action have deprived her of the right to such relief. The court there said: "So far as the divorce awarded to the defendant is concerned, the motion should have been granted under the rule laid down in *McBlain v. McBlain*, 77 Cal. 509. In that case the court, per Paterson, J., said: 'The parties to the action are not the only people interested in the result thereof; the public has an interest in the result of every suit for divorce; the policy and the letter of the law concur in guarding against collusion and fraud; and it should be the aim of the court to afford the fullest possible hearing in such matters.' In the present case there seems to have been an honest desire on the part of the plaintiff to present her side of the case; and while in an ordinary action the neglect shown might be sufficient to deprive her of a right to relief, yet in this kind of a case a more liberal rule should prevail."

In *Mulkey v. Mulkey*, 100 Cal. 91, it is said: "An affidavit of merits on grounds of public policy has no place in a proceeding of this character. (*McBlain v. McBlain*, 77 Cal. 507.) The motion should have been heard and determined alone upon the grounds stated in the notice and affidavits. The facts stated in the affidavit of defendant show either collusion between the parties, or that the defendant was grossly misled and deceived by her husband as to the ground of proposed action, he having informed her, as she states, that it would be brought on the ground of desertion. In either case the court should have been prompt to set aside the judgment and allow the defendant to answer, so that the cause might be heard and determined on its merits. The judgment is a harsh

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one, and fearful in its consequences. It deprives the defendant, among other things, of children, home, property and character. To justify such a judgment the evidence should always be clear and convincing; and when obtained in an action of this character, under circumstances such as are disclosed by the record in this case, it should, upon a proper application, made by the appellee for that purpose, be vacated without hesitation, and a much slighter showing than the one here made would be amply sufficient for the purpose. The affidavit of the defendant, in so far as it purports to be an affidavit of merits, was, as we have stated, immaterial; but, in this case, although the practice is not to be commended, it serves the purpose of a proposed answer by specifically denying the material allegations of the complaint, thereby showing what the answer would be if permitted to be filed." See also *Locke v. Locke*, 18 R. I. 716.

To permit a default to be opened and allow a defense to be interposed which is not meritorious should not be vigorously opposed in divorce cases owing to the effect that divorce has upon the parties and their offspring. *Hamilton v. Hamilton*, 51 N. Y. S. 365. In *Bostwick v. Bostwick*, 73 Tex. 182, a divorce case was called out of its order, tried and decided. An application to reopen and permit the defendant to defend was denied by the trial court and reversed by the supreme court on the ground that although defendant had not answered she was entitled to defend and it was error to call the case out of its regular order on the docket, the court enunciating the rule that "The law encourages defenses of divorce suits." In *Simpkins v. Simpkins*, 14 Mont. 386, suit for divorce was instituted in Montana. The defendant, who lived at La Crosse, Wisconsin, there employed an attorney to represent her. Her Wisconsin attorney secured the services of an attorney in Montana to assist in the defense and the

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latter appeared in the action and prepared an answer after which he agreed with plaintiff upon a compromise as to alimony and notified the defendant that if the compromise was not accepted he would withdraw from the case. Defendant sent a telegram to the Montana attorney refusing to accept the compromise and wrote him some letters explaining why she could not accept the compromise and why he was in error as to having authority to make it, but the Montana attorney returned the letters unopened and withdrew from the case, whereupon the defendant's default was entered, an *ex parte* hearing was had and a decree rendered in favor of the plaintiff who forthwith was married to another woman. A motion to open the default and set aside the judgment in the case and permit the defendant to defend was made, the different facts being shown by affidavit wherein the defendant disputed the *bona fides* of the plaintiff's residence in Montana, but the motion was denied and from the order denying defendant's application to open the case the defendant appealed. The appellate court reversed the order refusing to open the case and in the opinion said: "Divorce laws and procedure in some jurisdictions are often a subject of adverse criticism. If such a proceeding as the one before us is allowed to pass with approval or unchallenged such criticism would be wholly just."

It is argued on behalf of the libellant that the libellee was negligent in that he waited from the time that he was served at San Diego, Cal., which was on March 23, 1917, until just before the time fixed for the hearing before notifying his attorney in Honolulu to appear for him. But in considering this question we must keep in mind the facts that libellee was then a naval officer in the service of the United States on duty at sea in time of war, and that he was not in the same position as an ordinary civilian so far as time and opportunity to attend to personal matters

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were concerned. He did take such course as would notify his attorney under ordinary circumstances of the time of trial and did request the attorney to appear for him and procure delay so that he could be present and defend the libel. It was not his fault that his attorney was absent from his place of business and residence and on another island, nor was it the fault of his attorney. Libellee may or he may not have had the opportunity of communicating the facts relative to his defense to his attorney prior to the time that he wrote the letter stating them. If libellee was negligent in not proceeding to make his defense prior to trial such negligence is not shown other than by lapse of time and this is overcome to some extent by the circumstances and situation of the libellee, who has shown an intention to defend and present testimony and evidence which were not before the court for the purpose of defeating the divorce, and we are of the opinion that he should have been permitted to do so. If this was an ordinary action wherein the public is not interested we probably would hold that the discretion vested in the trial judge was not abused, but being a divorce case, the public being interested, and the defendant a naval officer in the public service on duty at sea in time of war, not free to leave his post of duty and to come and go at will, we hold that the trial judge should have opened the default, set aside the decree, and have permitted the libellee to present his defense and that it was an abuse of discretion in this case to have refused to do so.

The order denying to grant the motion to open the default and set aside the decree is reversed and the cause remanded for further proceedings consistent with the views herein expressed.

*J. W. Cathcart and C. S. Franklin (Thompson & Cathcart and C. S. Franklin on the brief) for libellant.*

*C. S. Davis for libellee.*



Syllabus.

LEWERS & COOKE, LIMITED, v. WONG WONG,  
MORRIS ROSENBLDT, FRED HARRISON, AND  
THE HONOLULU SKATING RINK, LIMITED.

No. 1034.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

HON. C. W. ASHFORD, JUDGE.

ARGUED OCTOBER 22, 1917.

DECIDED NOVEMBER 1, 1917.

ROBERTSON, C.J., QUARLES, J., AND CIRCUIT JUDGE KEMP  
IN PLACE OF COKE, J., ABSENT.

**APPEAL AND ERROR—*reserved questions—points decided.***

A decision of the supreme court upon questions reserved by a circuit court which present but one of several points which have been raised by a demurrer to a complaint, the point being overruled, is not a decision that the complaint states a complete cause of action.

**TRIAL—*pleading—proof—demand—nonsuit.***

Where a demand is a condition precedent to the maintenance of an action the failure to allege it does not dispense with the necessity of proving it at the trial under an answer raising the general issue, and the failure to make such proof may be taken advantage of by motion for nonsuit though the point was not raised by demurrer.

**MECHANICS' LIENS—*demand on owner—waiver.***

In order to enable a material-man to maintain a proceeding for the enforcement of a lien he is obliged to prove that he made demand upon the owner for the amount claimed after giving notice of the claim of lien and before commencing the proceeding to enforce it. The owner does not waive such demand by failing to demur to the complaint for lack of an allegation of demand, and filing an answer of general denial.

**PAYMENT—*application of payments by the court—open account.***

An open continuous account is generally regarded as one debt for the unpaid balance, and general credits will ordinarily be applied against the earliest debts, but where a material-man keeps a continuous account with a contractor in which entries are made for material furnished and payments made in connection with

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certain specified jobs of the contractor a credit entry which designates a particular job is evidence of an intention on the part of the creditor to apply the payment to the bill for material furnished for that job, and though it may fall short of a legal application because the debtor was not notified of it, the court in making the application will follow that intent especially as it appears to be fair and equitable.

## OPINION OF THE COURT BY ROBERTSON, C.J.

This case, which is one to enforce a material-man's lien, was before this court upon certain reserved questions which were certified up in connection with a demurrer to the complaint which was then pending in the circuit court. 22 Haw. 765. After that, the demurrer having been overruled, an answer was filed by the defendants Rosenbledt and Harrison. The Honolulu Skating Rink, Limited, defaulted, and Wong Wong confessed judgment in open court. Trial was had upon the issues raised by the answer of Rosenbledt and Harrison, and at the conclusion of the evidence for the plaintiff the court granted a nonsuit upon the grounds (1) that it affirmatively appeared that the contractor, Wong Wong had paid the plaintiff in full for all the material which had been supplied and used in the building in question, and (2) that there was no proof that the plaintiff had made a demand upon the owners against whose property the lien was sought to be established, after the notice of lien had been filed and before this proceeding had been commenced, for the sum due. The plaintiff brings exceptions.

We take up the second ground first. The argument made on behalf of the appellant is that demand by a subcontractor or material-man upon the owner is not required to be shown; that if the statute requires that such demand be made, it being for the advantage of the owner may be waived by him, and in this case demand was waived by Rosenbledt and Harrison. It is also contended that this court

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in passing on the reserved questions decided for all purposes of this case that the plaintiff's complaint set forth a valid cause of action, and that as a demand upon the owners had not been alleged none need be proved. The record shows that prior to the reserving of the questions by the circuit court a plea in abatement had, by stipulation of the parties, been withdrawn and a demurrer filed upon agreement that a copy of the lease between Rosenbledt and Harrison, as lessors, and the skating rink company, as lessee, which was attached to the stipulation, should be considered by the court in connection with the complaint and the demurrer thereto. In addition to the general ground that the complaint did not set forth facts sufficient to constitute a cause of action, certain special grounds were stated, namely, that it appeared by the complaint that there was no contractual relation between the plaintiff and the defendant lessors, that the lessors were not "owners" within the meaning of section 2863 of the Revised Laws, that their interest in the land was not subject to a lien for materials furnished to their lessee, that the lessors had no interest in the subject-matter of the suit, and that there was a misjoinder of parties defendant. The point that the complaint did not allege a demand on the defendants other than Wong Wong, the contractor, was not specially raised. The stipulation contained the statement that "The object of this stipulation is to submit to the circuit court and the supreme court the question whether the plaintiff's bill of complaint in connection with said lease constitutes a good cause of action against the defendants Rosenbledt and Harrison." But the questions actually reserved for the consideration of this court were not as broad as the demurrer. As shown by our former opinion the questions went to the single point "whether the plaintiff's lien attaches to the interest of the lessors, as well as that of the lessee, in the land upon

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which the building was erected." The questions might well have been returned unanswered, as being an attempt to try a case by piecemeal. *Rumsey v. N. Y. Life Ins. Co.*, 23 Haw. 142. Nevertheless, we went on and answered the questions in the affirmative. The question whether plaintiff's complaint was demurrable for the lack of an allegation of a demand on the owners, not having been presented for our consideration, was not passed upon either expressly or impliedly. We hold that the point as to no demand on the owners was properly raised as a ground for a nonsuit.

Section 2867 of the Revised Laws provides that "The liens hereby provided may after demand and refusal of the amount due, or upon neglect to pay the same upon demand, be enforced by proceedings in any court of competent jurisdiction, by service of summons, as in other cases." That provision, in the case of *Lewers & Cooke v. Fernandez*, 23 Haw. 744, was held to apply in a proceeding instituted against an owner and a contractor by a material-man, the court expressing the view that after notice of lien is served demand upon the owner for the amount claimed under the lien is a condition precedent to the enforcement of the lien. It is contended that that case was incorrectly decided; that it is in conflict with the decision in *Hopper v. Lincoln*, 12 Haw. 352; and that it is inconsistent with the ruling made in the former decision in the case at bar to the effect that the mechanics' liens statute, in its remedial aspect, is to be liberally construed. The opinion in *Hopper v. Lincoln* states that "The only question raised by the exceptions is whether an execution could properly issue upon a judgment for the enforcement of the lien against the property covered by it." The provision of the statute relating to demand was not involved or referred to in that case. And this is true also of the case of *Allen & Robinson v. Redward*, 10 Haw. 151,

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which is cited in the appellant's brief. In two cases cited by the appellant, *Steel Brick-Siding Co. v. Muskegon M. & F. Co.*, 98 Mich. 616, and *Duckwall v. Jones*, 156 Ind. 682, it was held that a demand before filing suit is not necessary. But in neither of them does it appear that the statute required that demand should be made. In the former opinion in this case it was held that the prescribed requirements which are to be met by persons who may assert the lien must be strictly complied with, and the conditions which give rise to the lien must be clearly shown to exist, but that the remedial portions of the statute should be liberally construed. The making of the demand required by section 2867 lies between those conditions which must be met in order to give rise to the lien and the proceedings for its enforcement. But granting that it falls within the remedial aspect of the statute, the rule of liberal construction would not warrant the court in ignoring the requirement. Though there is some force in the argument that a demand by a material-man upon the owner for money due from the contractor ought not to be required, and that service upon the owner of a copy of the notice of the claim fully serves the purpose of apprising him of the nature of the claim and its amount, we believe the reasoning in *Lewers & Cooke v. Fernandez* to be sound. It is contended that a demand, though required by statute to be made, is a matter for the benefit only of the owner and may be waived by him, and that demand was waived by the owners in this case by their failure to demur on the ground of the absence of an allegation of demand and the filing of an answer denying all liability. A liberal construction of the statutory requirement would require a holding that demand may be waived by the owner, but we are unable to sustain the contention that a failure to demur and the filing of an answer of general denial constitutes a waiver. The making of the demand is a

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condition precedent to the commencing of the proceeding for the enforcement of the lien. It should be alleged in the plaintiff's complaint as having been made. The failure of the defendant to demur would not dispense with the necessity of proving the fact in order to enable the plaintiff to recover. But the facts which may be claimed to constitute the waiver must have existed prior to the filing of the suit, and we hold that the course of pleading adopted by the owners in this case does not necessarily show that if demand had been made upon them before the proceeding was taken into court they would not have made a settlement. Counsel are right in saying that the object of a demand is to enable the party to settle without suit, and it would seem to follow that the alleged waiver must have occurred before the commencement of the suit. A "waiver" is the intentional relinquishment of a known right (40 Cyc. 252) and there is nothing to show that either Rosenbledt or Harrison intended to relinquish the right to a demand before the action was instituted. And our statute provides that under an answer denying generally the truth of the facts alleged in the plaintiff's complaint the defendant may give in evidence as a defense to the action "any matter of law or fact whatever." R. L. 1915, Sec. 2369. We hold therefore, that the nonsuit was properly granted as to the parties against whose property the lien was sought to be enforced, and that the exceptions to this extent must be overruled.

The appellant contends that the circuit court erred in finding that the defendant Wong Wong was not indebted in any sum to the plaintiff at the time of the trial of the action, and in giving judgment in favor of that defendant notwithstanding his confession in open court. This contention is sustained. Whether, if the evidence on the trial of the case against the other defendants had tended to show that Wong Wong had paid all he owed the plaintiff,

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the court would have been authorized in giving judgment in his favor in spite of his confession we need not stop to consider. The record shows that it was proven by uncontradicted evidence that the plaintiff advanced to Wong Wong the sum of \$1950 in cash to pay for labor in the erection of the building in question and furnished materials of the value of \$3106.61, and that the defendant paid on account the sum of \$3015, leaving an unpaid balance of \$2041.61, for which the plaintiff claims to be entitled to judgment. The finding of the trial court that the plaintiff had made "an application of all credits generally upon all charges generally and that prior to the trial of this action credits allowed by Lewers & Cooke, Ltd., to Wong Wong overbalanced all indebtedness of Wong Wong to Lewers & Cooke, Ltd., to and including the last charge for material furnished him on account of the building involved in this action," is not sustained by the evidence. Wong Wong's account on the plaintiff's books was kept as one continuous account, a balance being carried forward at the end of each month, but in every credit for a payment made the entry specified the particular bill in settlement or on account of which the payment was intended to be applied. An open continuous account is generally regarded as one debt for the unpaid balance, and general credits will ordinarily be applied against the earliest debits, but where a material-man keeps a continuous account with a contractor in which entries are made for material furnished and payments made in connection with certain specified jobs of the contractor a credit entry which designates a particular job is evidence of an intention on the part of the creditor to apply the payment to the bill for material furnished for that job, and though it may fall short of a legal application because the debtor was not notified of it, the court in making the application will follow that intent especially as it appears to be fair

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and equitable. The circuit court in arriving at the conclusion it did evidently took into consideration the fact that certain payments had been made by Wong Wong subsequent to the commencement of this action. The evidence shows that those payments were intended to be applied in the manner above indicated. The circumstances under which the credits on other bills of Wong Wong were entered by the plaintiff were not made clear by the evidence, but it appears by the record that the skating rink company had accepted the contractor's order in favor of the plaintiff for the amount of the contract price of its building and that the sum of \$3015 had been paid to the plaintiff pursuant to the order. Under these circumstances the court properly applied that sum against the bill for cash advanced and material supplied for the skating rink job, but not so as to such sums as were regarded as moneys paid in on account of bills for materials furnished for other jobs, particularly moneys paid in after the commencement of this action, as that would prejudice the just rights of other parties as well as of the plaintiff. See generally, 30 Cyc. 1240, 1250; *Clow v. Goldstein*, 147 Ill. App. 571; *American Woolen Co. v. Maaget*, 86 Conn. 234, 248; *Nashville etc. Bank v. National Surety Co.*, 130 Fed. 401, 406; *Allen & Robinson v. Redward*, 10 Haw. 151 and 273.

The exceptions are overruled so far as they relate to the owners, and sustained so far as the decision and judgment in favor of the contractor is concerned, and the cause is remanded.

A. L. Castle (*Castle & Withington* on the brief) for plaintiff.

E. C. Peters for defendants Rosenbledt and Harrison.



Syllabus.

ALFRED W. CARTER, TRUSTEE, v. TERRITORY OF  
HAWAII.

No. 959

APPEAL FROM WATER COMMISSIONER.

HON. J. A. MATTHEWMAN, COMMISSIONER.

ARGUED AUGUST 6, 7, 1917.

DECIDED NOVEMBER 12, 1917.

ROBERTSON, C.J., QUARLES AND COKE, JJ.

**EASEMENTS—*water rights—abandonment—non-user.***

Mere non-user of water of however long duration does not constitute an abandonment of an appurtenant water right where there has been no substituted use, and there are no intervening equities, or there has been no adverse user.

**ABANDONMENT—*water rights—non-user—proof.***

Non-user of a right to take water from a stream is not shown by proof that branch ditches have been filled up or disused, where it appears that the intakes and main ditches leading from the stream have been maintained, and it does not appear that water has not been diverted as it has been available under a diminished supply.

**WATERS AND WATERCOURSES—*private water rights—basic law.***

Private water rights in Hawaii are governed by the principles of the common law of England except so far as they have been modified by or are inconsistent with Hawaiian statutes, custom or judicial precedent. The law of priority of appropriation which prevails in the arid sections of the mainland of the United States has never been recognized in this Territory.

**SAME—*ancient ditches—appurtenant rights.***

Ancient ditch systems connected with running streams became incorporated into the permanent topography of the country, and upon the acquisition of private titles to lands to which such ditches were tributary the right to water therefrom, in accordance with custom, passed as an appurtenance or incident without express mention in the award or grant.

**SAME—*same—proportional diminution.***

Ancient ditches which were constructed and have been used for the purpose of diverting a constant flow of water from a stream and distributing it among several parcels of land are to be regarded virtually as natural water courses, and in case of drought or

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diminished supply the flow in one ditch may not be increased by artificial means to the detriment of lands entitled to water from another ditch, but the dams must remain as they were and all must suffer accordingly. The general principle of proportional diminution in times of scarcity applies as well to different lands along one ditch as between different ditches from the same stream, but where the supply has greatly diminished the rule will not be applied as between the several owners on a long ditch if the entire flow would be lost through seepage and evaporation.

**SAME—*natural use—artificial use—superior right.***

The natural use of water for domestic purposes is a superior right to its use for artificial purposes.

**SAME—*irrigation right—proof—quantity.***

Where a customary use of water for irrigation upon land at the time it first became the subject of private ownership is shown by satisfactory evidence the quantity is to be determined by the amount used at and immediately prior to the date of the award or grant, but the right is not to be denied merely because that quantity was not measured and cannot be proven.

**SAME—*new use—burden of proof.***

Under ordinary circumstances the burden of showing that a new diversion of water does not prejudice the right of another is upon the party asserting the right to the new use, but where the extent of the right possessed by the other is not known to himself and cannot be ascertained, the new use, if a beneficial one, ought not to be restrained upon merely conjectural grounds.

**SAME—*right to drinking water on ahupuaas.***

The right to drinking water declared by section 471 of the Revised Laws for the people on *ahupuaas* privately owned is a right in gross as distinguished from an appurtenant right to water for domestic use.

**SAME—*change in method of diversion.***

A concrete dam to divert water from a stream may be substituted for a rubble dam of loose construction if the change works no injury to other rights in the stream.

**SAME—*surplus waters of stream.***

Where a stream flows through one *ahupuaa* into another each *ahupuaa* is entitled to a reasonable use of the surplus water of the stream according to the principles applicable to riparian rights at common law.

**SAME—*water controversy—authority of commissioner.***

In a water controversy the authority of the circuit judge, sitting

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as commissioner, and the supreme court on appeal, is limited to ascertaining, determining, defining and enforcing proven rights.

## OPINION OF THE COURT BY ROBERTSON, C.J.

This is a proceeding brought under the statute (R. L. 1915, Ch. 165) for the purpose of determining water rights in the Waikoloa stream, at Waimea, Island of Hawaii. The petition, which was filed on June 13, 1914, named as respondents the Territory of Hawaii and about sixty-two individuals. Many of the respondents made no appearance and an order of default was entered against them. The petitioner's claims were contested only by the Territory, and both the Territory and the petitioner have appealed from the decision and decree of the commissioner. Respective counsel agree that the rights of those respondents who presented their claims and who have not appealed are not in issue in this court, and that the contest has narrowed down to one between the petitioner and the Territory only. In the petition the petitioner's ownership of certain lands was alleged and the right to the quantities of water claimed as appurtenant thereto for irrigation purposes by immemorial custom was stated as follows: An area of 94.3 acres at Kaomaloo, within and a part of the ili of Waikoloa, through the ditch known as the "Lyons" ditch, not less than 940,000 gallons per day; three *kuleanas* in the government land of Waikoloaiki, comprising an area of about nine acres, through a ditch (called Lanakila), not less than 95,000 gallons per day; five *kuleanas* in the government land of Lalamilo (adjoining Waikoloa), and a grant (R. P. 1157) of a parcel of land containing an area of 250 acres at Lihue (stipulated to be a portion of the "land or so-called ahupuaa" of Waimea), not less than 2,000,000 gallons per day through the ditch known as the "Akona" ditch. Also water for domestic use upon a parcel of land described in a deed from Kamehameha IV

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to Waimea Grazing Co., adjoining the Waikoloa stream; and the right to the surplus freshet water of the stream as it flows into and upon the *ahupuaa* of Ouli (adjoining Lalamilo) was claimed. It was alleged that in the year 1905 the Territory constructed a dam in the Waikoloa stream above the lands of the petitioner by means of which and a pipe system connected therewith it is wrongfully diverting large quantities of water to the damage of the petitioner. The prayer was for the determination of the respective rights of the petitioner and the respondents, that the petitioner's claims be confirmed, and that the maintenance of the dam and the diversion of the water by the Territory be adjudged to be unlawful. The answer of the Territory alleged that practically all of the waters of the Waikoloa stream have their source upon government lands and that the stream flows for the greater part of its length down to the *ahupuaa* of Ouli upon lands belonging to the Territory; that the Territory is the owner of the water of the stream except only in so far as rights therein may have passed as appurtenant to parcels of land awarded to claimants by the land commission of 1846; that anciently water for irrigation was used on the ili of Waikoloa at Kaomaloo, though not to the extent claimed by the petitioner, but whether such use was exercised at the time of the award of the land and passed as an appurtenance thereto was left to the petitioner to prove; that the water used on the *kuleanas* in Waikoloaiki and Lalamilo respectively was for domestic purposes only, and whether the right to such use passed into private ownership by awards of said *kuleanas* was left to the petitioner to prove; that no water right passed as an appurtenance with the grant of the land at Lihue; and the claim of the right to any of the surplus or storm waters of the Waikoloa stream as appurtenant to the *ahupuaa* of Ouli was disputed and denied. It was alleged that whereas the dam

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at the intake of the Lyons ditch was originally composed of rubble of loose construction which permitted of considerable percolation, the petitioner, in or about the year 1907, constructed a new dam made of concrete with which to divert water into the Lyons ditch, and that said new dam was erected at a point about fifty feet further up stream than the former dam. It was also alleged that formerly a portion of the water of the Lyons ditch and a portion of that of the Akona ditch combined at a certain point and were augmented by water (arising on government land) running through ditches from Pelekuaiau pond and flowed past the lands of the petitioner to the land of Lalamilo, about 10,000 feet below the petitioner's land at Lihue, and was used by persons then living there (but who acquired no title to land) for domestic purposes and irrigation. It was also alleged that such rights to water as may have passed as appurtenant to the lands of the petitioner and the other respondents have been "to a large extent" abandoned and lost and have reverted to the Territory. It was further alleged that formerly the rainfall in the locality was much greater than now, that the forests were more extensive, and the flow of water in the Waikoloa stream was much more abundant and constant, and the requirements for artificial irrigation were less extensive than they are at present. And it was further alleged that the rights of the petitioner are not superior in any way to the rights of the Territory in the waters of said stream and that in times of scarcity the maximum rights of the petitioner and of the other respondents are subject to diminution in accordance with the circumstances. That the diversion of water from the stream by the Territory deprived the petitioner of any water to which he may be entitled was denied. The answer prayed that the Territory be adjudged to be the owner of all the water of the Waikoloa stream except only such as passed as appur-

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tenant to the lands awarded by the land commission and have not been abandoned; that its right to maintain the dam in the stream be adjudged; that the rights of the respondents be determined; and that the petitioner be enjoined from further maintaining the concrete dam or any other dam at the intake of the Lyons ditch differing in construction or location from the original dam at that place.

The commissioner held, as we understand from his opinion, that the lands mentioned in the petition for which irrigation rights were claimed were in fact entitled to such. As to the land at Lihue, he held that it was "entitled to water as of the date of application" for its purchase by Macy and Louzada. He also held that the government land makai of Lihue was entitled to water from the ditches which reached it through Kaomaloo and Lihue, meaning, we infer, that the water was formerly used by the inhabitants there for irrigation as well as domestic use; that the government's right to irrigation water is still existent; and that since there has been a large decrease in the available water supply the petitioner's irrigation rights would have proportionately decreased if they had not been lost. The commissioner held, however, that the evidence was so indefinite and unsatisfactory that it was impossible to say what quantity of water was appurtenant to any particular piece of land, and he further held that by reason of long non-user coupled with the fact that the petitioner as well as the individual respondents, by inaction, had acquiesced in the installation by the Territory of its dam and pipe system, had abandoned their rights to water for irrigation; and that as section 471 of the Revised Laws, relating to the rights of the people on lands awarded to "landlords," is declaratory of ancient rights and of the common law of Hawaii, the petitioner and the individual respondents are entitled to water for domestic use from the

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stream. It was held that the Territory has the right to conserve and divert the water of the stream in order to supply the villagers of Waimea with water for their homes. No finding or order was made with reference to the dam erected by the petitioner at the Lyons intake. A decree was entered in accordance with the commissioner's opinion. The Territory was adjudged to be the owner of all of the waters of the Waikoloa stream, surplus and storm waters as well as the normal flow, impressed only with "the obligation of allowing the people of the ahupuaa of Waimea" (including, we take it, the *ilis* in Waimea) to take water from the stream for household purposes. And it was adjudged that neither the petitioner nor any of the individual respondents, by reason of the ownership of lands, or otherwise, is entitled to any of the waters of the stream except for household use.

The case was exhaustively tried; a large number of witnesses were examined; and the transcript of testimony covers about 3400 pages. Elaborate briefs filed by respective counsel show much contrariety of opinion as to the law as well as upon the facts. So far as the facts found by the commissioner depended upon conflicting testimony they will not be disturbed under the ruling made in the case of *Hilo Boarding School v. Territory*, 23 Haw. 595.

The *ahupuaa* of Waimea in the district of South Kohala, Island of Hawaii, though mostly taken up by the *ilis* of Waikoloa and Puukapu (*Harris v. Carter*, 6 Haw. 195, 207), the former being now owned by the petitioner in this case, gives its name to the general locality in which this controversy arose. The Waikoloa stream, which flows partly upon government land, partly upon land of the petitioner, and for some distance along the boundary between the two, has from time immemorial been tapped by a number of ditches or *auwais* the three principal of which have in modern times been known by the names of Lyons,

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Lanakila and Akona. These and other ditches further down the stream took water out of the stream on either side, but principally on the southerly side, and distributed it by means of numerous branches to the lands now belonging to the petitioner and the individual respondents and, as found by the commissioner, to parts of the land of Lalamilo where it was used by *hoainas* who obtained no title to the parcels occupied by them (the title thereto remaining in the government), and altogether formed a rather elaborate water system, indicating the presence, long ago, of a considerable population. Commodore Wilkes in his "Narrative of the United States Exploring Expedition" (1838-42) Vol. 4, p. 218, referring to the district of Waimea, apparently meaning South Kohala, said, "The population is registered at six thousand five hundred," while the census of 1866 showed the population of South Kohala to be 1089, a decrease since that of 1860 of 232. There was a conflict in the testimony as to whether the use of the water upon the privately owned lands extended to irrigation or was confined to domestic use, but we believe the weight of the evidence sustains the finding which we understand the commissioner to have made in favor of the right to water for irrigation as appurtenant to the lands in question. The evidence showed, and it has become an admitted fact, that at the time private titles to these lands were first acquired the flow of water in the Waikoloa stream was very much greater than it has been in recent years. It was not a mere temporary shortage due to drought that was shown, but a gradual and apparently permanent diminution in the natural water supply. There appears never to have been a division of water by time among the lands in this locality. The claims were to a continuous flow.

We do not sustain the finding made by the commissioner that the right to water for irrigation purposes appur-



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tenant to the petitioner's lands has been lost by abandonment. The alleged abandonment of an easement presents a question of intention and of fact, the burden of proof being upon the party making the allegation. Jones on Easements, Secs. 849, 850. The commissioner based his conclusion, however, upon three grounds, viz.: (1) non-user, (2) acquiescence in the erection by the government of its dam, and (3) express renunciation by the petitioner, at the hearing of his claimed right to have the government's dam removed. It appeared that the petitioner had notice, before the completion of the government's dam, that it was about to be constructed, or was in process of construction, and made no attempt to prevent its erection. It also appeared that at the time the property of the petitioner was temporarily in the hands of a receiver pending the determination of certain litigation, and the argument is now advanced that as the petitioner's hands were tied, so to speak, nothing should be held to his disadvantage because of his failure to move under the circumstances. We think there is no force in this contention since notice, by way of protest or otherwise, of his rights or claims in the premises could have been given by the petitioner to the government either through the receiver by permission of the court, or directly and without such permission, since the sending of such notice would not have interfered with the duty of the receiver to conserve the property held by him under order of court. But, on the other hand, the government had rights in the water of the Waikoloa stream, and the petitioner would not be heard to complain of the erection of the dam until water was diverted or some use thereof threatened which would actually interfere with his rights in the water. Counsel for the Territory does not claim that there was an estoppel. We hold that the failure of the petitioner to object to the erection of the dam, either of itself or in connection with the other cir-

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cumstances, cannot be regarded as an abandonment. What occurred at the close of the hearing of the case cannot be fairly construed as a waiver or evidence of an intention on the part of the petitioner to abandon any irrigation rights. The record shows that counsel said to the commissioner, "We will stipulate for the record that we do not ask the court to remove the dam \* \* \* We are willing that the system remain there subject to an acknowledgment of petitioner's right to the water up to whatever amount the court decrees. We want title to the water and want those people to be in a position to be compelled to recognize it. \* \* \* We will ask leave to amend the prayer so that we do not seek to remove this dam." The commissioner evidently thought that the maintenance of the dam was entirely inconsistent with any rights in the petitioner to water except for household purposes. It is also evident that counsel, in making his statement, did not so understand it or he would not have made the statement. That the maintenance of the dam for the diversion of water for domestic use is not incompatible with the existence of rights to water for irrigation purposes upon petitioner's lands will be shown later. Non-user, then, remains as the sole prop for the commissioner's finding that there has been an abandonment. But mere non-user of water of however long duration does not constitute an abandonment of the right where there has been no substituted use, and there are no intervening equities, or there has been no adverse user. *Jones on Easements*, Sec. 863; 40 Cyc. 566; *Wailuku S. Co. v. Widemann*, 6 Haw. 185; *Haw. Com. & S. Co. v. Wailuku S. Co.*, 15 Haw. 675, 691; *Adams v. Hodgkins*, 109 Me. 361, 365; *Sowles v. Minot*, 82 Vt. 344, 355. This was recognized by the commissioner, but he held that the evidence of non-user plus the other circumstances proved abandonment. Furthermore, non-user, within the proper sense of the term, we think, was

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not shown. The points at which the exercise of the petitioner's right to water takes place are at the dams by which water is diverted from the stream. The evidence does not show, and we do not understand it to be contended, that there has been any interruption in the maintenance of the dams, or of the main ditches across the land of the Territory, or an omission to take water from the stream. True, the amount of water diverted during many years past was much less than in former times, but that may be accounted for in the fact of the greatly diminished flow in the stream. The facts that there has been a failure to use what water has been diverted in recent years for irrigation, and that branch ditches situated wholly upon the land of the petitioner have become filled up or disused do not, we believe, show a non-user of the right within the true meaning of the term. The ruling of the commissioner on this point must be reversed.

Except as to the land at Lihue, which will be considered presently, the case is free from any claim on either side of prescriptive rights by adverse user. The principal questions are as to what effect the fact of a greatly diminished supply of water in the stream has upon the rights of the parties, and as to the right of the Territory to make a new use of a portion of the water. Private water rights in this Territory are governed by the principles of the common law of England except so far as they have been modified by or are inconsistent with Hawaiian statutes, custom or judicial precedent. R. L. 1915, Sec. 1. The law of priority of appropriation which prevails in the arid sections of the mainland of the United States has never been recognized in this jurisdiction. The diversion of water from natural streams by means of artificial ditches for domestic and agricultural use was practiced by the Hawaiians before the advent to these islands of the white man. The ancient ditch systems connected with running

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streams became a permanent feature of the topography of the localities where they were constructed. And upon the acquisition of legal titles to lands to which such ditches were tributary the right to water therefrom passed as an appurtenance or incident without express mention. In *Peck v. Bailey*, 8 Haw. 658, 661, Chief Justice Allen said, "There can be no difference of opinion that the complainants were entitled to all the water rights which the lands had by prescription at the date of their title. By the deed, the water courses were conveyed and a right to the water accustomed to flow in them. The same principle applies to all the lands conveyed by the King, or awarded by the land commission. If any of the lands were entitled to water by immemorial usage, this right was included in the conveyance as an appurtenance. An easement appurtenant to land will pass by a grant of the land without mention being made of the easement or the appurtenance. \* \* \* The grantor of complainants has conveyed portions of this *ahupuaa* to several persons. Each grantee will hold all that has been conveyed to him, unless it should conflict with a previous conveyance. This includes the water courses on their lands, and all the water which the lands had enjoyed from time immemorial." The appurtenant rights of *kuleanas* in government *ahupuaas* to water for irrigation are similar to those in privately owned *ahupuaas*, except that in the latter case they might be enlarged by adverse user. In either case the right of any part of the *ahupuaa* which by ancient use was irrigated land would be on an equality with irrigated *kuleana* land. We are not prepared to say that in no case did the land commission, in making an award of title to land, expressly mention water rights, but in most cases at least no such mention was made even where such rights were undoubtedly intended to pass. Of course where a *kuleana* was described in an award as *kalo* or *loi* land it would be evi-

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dence that the land was entitled by ancient custom to a supply of water for the cultivation of wet land taro, and the lack of such description would probably be evidence to the contrary, though not conclusive. The irrigation rights claimed by the petitioner are not those pertaining to the cultivation of wet land taro. The evidence is to the effect that there were a very few *lois* of taro in the locality in question. It was shown that the Hawaiians habitually raised in their house-lots dry land taro, bananas and vegetables as well as sugar cane which they cultivated for human consumption as well as for food for their animals. And it is a fair inference from the evidence that the ditch system at Waimea was constructed for the purpose of supplying water to the inhabitants for household purposes and for the irrigation, when the natural rainfall was insufficient, of their crops. It appeared in evidence that the capacity of the Akona ditch was between twelve and fifteen million gallons per twenty-four hours. The capacity of the Lyons ditch was not shown, but we infer from the testimony that it was not less than that of the Akona ditch. The other ditches were smaller. The quantity of water which flowed in these ditches either in former or recent times was not shown. The finding of the commissioner that it is impossible to decide upon the uncertain evidence what amount of water the lands of the petitioner were or are entitled to for irrigation purposes is affirmed. But it does not necessarily follow that, because of that fact, their right to irrigation water is to be denied. It is very difficult at this late day to show what quantity of water was used upon a particular parcel of land by ancient custom when it first became the subject of private ownership. Where the use of water upon land by ancient custom is shown by satisfactory evidence the right is not to be denied merely because the quantity has not been measured and cannot be proven. Counsel for the petitioner refers to

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the case of *Hilo Boarding School v. Territory, supra*, where the court affirmed the decision of the water commissioner holding that the petitioner's land was entitled to a definite quantity of water though there was no direct evidence as to the quantity supplied at or before the date of its award, and it could be "only roughly approximated with a wide possibility of error." But in that case there was a well constructed ditch of known capacity and tangible evidence of the amount, within approximate limits, of the quantity of water which had flowed therein at different times, and the evidence showed a continuous use from a time antedating the award of the land. Here, the fact of variable and diminished use, though it did not constitute an abandonment, furnishes, in connection with the changed conditions at the Lyons intake, a potent element of uncertainty in an attempt to determine the quantity of water to which the several parcels of land are entitled. The preponderance of evidence showed that the supply of this ditch system on the southerly side of Waikoloa stream was augmented, as contended by the Territory, with an unknown quantity of water from Lanimaumau stream through Pelekuaiau pond the rights in which were not submitted for adjudication in this proceeding. There is testimony that on two occasions while the hearing was on the flow in the ditch from Pelekuaiau pond was measured and found to be about 910,000 and 870,000 gallons per day respectively. But it did not appear whether or not those were normal amounts for recent years or how they compared with the flow of former times. The commissioner was not required to base a finding as to quantity on mere conjecture, nor is this court.

Where ditches are shown to have been entitled by ancient use to take from a stream a definite proportion of the water normally flowing therein the same division is to be maintained in times of diminished flow. *Peck v.*

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*Bailey, supra.* The rule is the same where the division is by time instead of proportion of the water. See *Yick Wai Co. v. Ah Soong*, 13 Haw. 378, 382. In that case, which was a contest between the owners on one ditch and those on another, the court said, "In times of drought the dam and ditch must remain in the same condition substantially as in times of plenty, and all must suffer accordingly." Large ditches which were constructed and have been used for the purpose of diverting a constant flow of water from a stream and distributing it among several parcels of land are to be regarded virtually as natural water-courses. This point was suggested, though not decided, in *Wailuku S. Co. v. Widemann, supra.* When nature diminishes the water supply the flow in one ditch may not be increased by artificial means to the detriment of the lands entitled to water from another ditch. In neither of the two cases just cited, however, was the application of the theory of proportional diminution to a permanently diminished supply involved, and the matter of loss by seepage and evaporation was not a prominent feature as it is in the present case. But under the rule that in a time of drought the dams and ditches must be permitted to remain in the same condition as in times of plenty, it would follow that if the flow of water in a stream is insufficient to reach the lower points of intake the owners furthest down would be entirely without water. The rights of the owners along a ditch are, as against the *ahupuaa*, "far more" than mere riparian rights. *Peck v. Bailey, supra*, at p. 661. Their right is to divert and consume—not merely to use and return. The general principle of proportional diminution applies as well to different lands along one ditch as between different ditches from the same stream. Hawaiian custom seems to have recognized this. In *Lonoaea v. Wailuku S. Co.*, 9 Haw. 651, 660, it was said, "The *konohiki* or head man of the land divided the water



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in times of scarcity taking care that the kalo patches of the chief who held possession of the *ahupuaa* were filled first, and he endeavored to provide that all should have sufficient to keep his crop in condition." And in *Horner v. Kumuliili*, 10 Haw. 174, 178, the court said, "When the quantum of water in the stream was diminished through drought he (the *konohiki*) saw to it that the quantity used by each was divided equally." But this rule of apportionment must be taken with some qualification for it cannot always be applied with full force as between the several owners along the line of a long ditch. In the case at bar the evidence tends to show that there has been so great a diminution in the normal flow of the stream that, after satisfying the primary right of the petitioner and individual respondents to water for domestic use, there remains a comparatively small quantity available for other purposes. The evidence tends further to show that for many years—forty or fifty years at least—there have been no persons living on the government land of Lalamilo below Lihue, and during that time no water for irrigation has been used thereon. It would be absurd to hold, therefore, that, because formerly, when there was an abundance of water, those lands were irrigated through branches from the Lyons and Akona ditches, the lands of the petitioner may not have the available water for irrigation, and to say that the flow in the ditches must not be materially diminished, even though, in the attempt to send a supply down to those distant lands, the entire flow should be consumed by seepage and evaporation. And the Territory could not convert the last right into a first right by taking the water out at a point far above to the detriment of the petitioner.

With reference to the land at Lihue some special points are to be considered. On behalf of the petitioner it is claimed that the evidence shows that at and for some years



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prior to the grant of this land large quantities of water were used thereon for the irrigation of sugar cane and for the purpose of power as well as for domestic use. The argument is that the amount of water then being used on the premises passed as an appurtenance with the grant of the land, and that as a grantor cannot derogate from his grant the government cannot now claim the right to divert water from the source of supply even for the purpose of supplying residents of the vicinity with water for domestic purposes. The argument advanced on behalf of the Territory is to the effect that as government grants are construed strictly against the grantee, and nothing passes by implication, no water rights whatever passed with the grant of the land since no mention thereof was made in the instrument, and counsel draw a distinction between awards of land by and through the land commission, which it is conceded passed water rights by implication, and direct grants. We do not sustain the contention of either counsel. There is some question whether the land at Lihue, though stipulated to have been a part of Waimea, which was crown land, was itself crown land at the time it was granted. The fact that it was granted by royal patent in the usual form, the purchase price going to the government, would indicate that it was not regarded as crown land at that time. On behalf of the petitioner the argument is made that as the land was crown land, and as crown lands prior to the enactment of the statute of January 3, 1865 (see *Galt v. Waianuhea*, 16 Haw. 652, 655), were regarded and treated as the private lands of the king, though descending to his successors in office (see *Estate Kamehameha IV*, 2 Haw. 715) the conveyance is not subject to the rule of strict construction applicable to public grants. And the further argument is made that the waters of the Waikoloa stream, being crown land waters, were subject to acquisition by prescriptive rights

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through adverse user, and that such user was established by the evidence in favor of the land at Lihue. This last point would seem to be foreclosed by the decision in *Galt v. Waiianuhca*, that the crown lands were not subject to adverse possession. But we think it is not necessary to enter upon a discussion of these matters. Under the view already expressed to the effect that these ancient ditches had, prior to the acquisition of private titles to the lands, become incorporated into the permanent topography of the country so as to become virtually natural watercourses, the right to water for both domestic use and irrigation, in accordance with ancient custom, passed with the conveyance of the land as an incident, like a riparian right at common law, though it was by public grant. 32 Cyc. 1036; *Union M. & M. Co. v. Ferris*, 24 Fed. Cas. (p. 595) No. 14371; *Cruse v. McCauley*, 96 Fed. 369, 374; *Sturr v. Beck*, 133 U. S. 541. The water right which passed with the grant of Lihue was not a superior right to a definite quantity. Like the rights which passed to lands awarded by the land commission, it was a right to such quantity of water as was customarily used on the land at and immediately before the date of the grant so long as that quantity continued to be available. The right did not attach as of the date the application was made by Macy and Louzada to the privy council for the purchase of the land, as held by the commissioner, for the application could have been withdrawn, the action of the privy council was merely advisory, and there is nothing to show that the amount of the purchase price was agreed upon prior to the date of the grant. This point is regarded by counsel as of some importance since it is claimed that the evidence shows that at the date of the application, October 15, 1850, water was being used upon the land for the irrigation of a considerable area of cane which was cultivated for the purpose of making into sugar, as well as for power to run

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a sugar mill, though such use may have ceased prior to the date of the grant which was July 11, 1853. There was much conflict in the testimony as to when the sugar plantation ceased to exist. The commissioner made no finding as to the fact. According to one witness the plantation was in operation in 1858 or 1859, but we find from the weight of the evidence that it ceased prior to 1853. Kainapau and Kahue, the oldest *kamaaina* witnesses, agreed as to this. The former, called by the petitioner, testified that his marriage, which took place in the year 1852, was "long after" the cultivation of cane at Lihue had ceased; and the latter, a witness for the Territory, said that it ceased two or three years prior to 1853. And Nainoa, another witness for the petitioner, though he contradicted himself, said that the cane planting had ceased prior to 1853 which he identified as the year of the great small-pox epidemic. Testimony given by a few other witnesses was, inferentially at least, to the same effect. Kainapau further testified that Macy and Louzada did not plant a crop of cane but merely took off the crop which was growing when they took over the place from Abraham Fayerweather, and it is in evidence that Fayerweather left Lihue in 1847. From this it would seem that the plantation ceased operations probably not later than the year 1849. But the water system at Waimea was not put in for the purpose of irrigating sugar cane upon a commercial scale, and the evidence does not warrant the conclusion that such purpose was incorporated into the system so as to be made an integral part of the system. The evidence shows that following the closing down of the sugar plantation Macy and Louzada operated a slaughter-house at Lihue and salted beef. They advertised in a Honolulu newspaper printed on February 7, 1852, under a "Notice to Whalers," that they could be supplied at Kawaihae, Hawaii, with beef, mutton, hogs, potatoes, etc., and on July 1, 1854,

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they advertised for sale "The stock farm at Lihue, Wai-mea." We hold, therefore, that the right to water for irrigation and other artificial purposes which passed with the grant to Macy and Louzada was not of the quantity which was at one time used in what seems to have been no more than an experiment in the attempt to grow cane on a commercial scale, but, as we have said, of such quantity as was being used at and immediately before the date of the grant. And that quantity was not permanently fixed but was subject to proportional diminution as in the case of other lands watered by the system (either *konohiki* or *kuleana*) in the event of drought or natural depletion of the general water supply. Furthermore, this right to water for artificial use is, in its nature, inferior to the primary right for domestic use.

It is well established at common law that the ordinary and natural use of water for household purposes, i. e., for drinking, washing, cooking, and for watering domestic animals, is a superior right to the use of water artificially, i. e., for mining, agricultural and commercial purposes. Gould on Waters (3d ed.) Sec. 205; 2 Farnham on Waters, Sec. 467. And we have no doubt that such is the law of this Territory. The ruling made in *Kaalaea Mill Co. v. Steward*, 4 Haw. 415, to the effect that where land has a water right the owner may use the water for any purpose he sees fit is not to the contrary. The question whether in case of diminished flow the right to water for artificial purposes would have to yield to the right for domestic use was not before the court in that case. We affirm the ruling made by the commissioner that the petitioner and the individual respondents, other than those against whom the order of default was entered, are entitled to water for domestic use, but not upon the ground upon which it was put. Section 471 of the Revised Laws, which was invoked by the commissioner, provides, *inter alia*, that

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“Where the landlords have obtained or may hereafter obtain, allodial titles to their lands, the people on each of their lands shall not be deprived of the right to take firewood,” etc., and “The people shall also have a right to drinking water, and running water, and the right of way.” Those rights, as we understand it, are rights in gross which may be exercised by the lawful occupants of *kuleanas* or separated portions of an *ahupuaa* against the *ahupuaa* itself after it has passed into private ownership. Each owner would have the right to obtain water at the stream for his domestic use if his land is without an appurtenant right. A squatter upon an *ahupuaa* the title to which is in the government would have no legal rights under the statute, and a grantee of a portion of a government *ahupuaa*, such as a homesteader at Waimea, would have only such implied rights as, upon general principles, would pass as appurtenant to his land under the grant thereof. The Waimea homesteaders were not made parties to this proceeding, but it has not been suggested that their lots have any appurtenant water rights. The rights asserted by the petitioner and the individual respondents to water for domestic use were not claimed under the statutory provision, but are rights appurtenant or incident to their respective parcels of land. It is such appurtenant rights that these parties are entitled to.

While the Territory is the riparian proprietor both above and below the points at which water is diverted to the lands of the petitioner it is obvious that the diversion by it of water to sell to the homesteaders is not the exercise of its riparian right. Such use, though a highly beneficial one, is a new and different use which could not be exercised to the detriment of the pre-existing vested rights of others. The evidence showed that the maximum capacity of the Territory’s pipe system is 700,000 gallons per twenty-four hours, and that the average quantity actually

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taken and used has been about 570,000 gallons per day. With the exception of one occasion on which there was estimated to have been about 15,000,000 gallons of water flowing in the stream (an abnormal quantity for recent times) measurements made in the months of May, June and August, 1915, showed that the flow below the government dam averaged 1,045,000 gallons per twenty-four hours, such supply being available for the satisfaction of the primary rights of the lands of the petitioner and the individual respondents for domestic use. Leaving out of consideration the government land below Lihue, where there has been no cultivation for many years, and which is evidently beyond the reach of the present day flow available for artificial purposes, the surplus, after satisfying all rights for domestic use, would be available for irrigation on the lands of the petitioner. What quantity of water is required for domestic use on any of those lands was not shown by the evidence. Nor, as stated above, was it shown what quantity of irrigation water the lands of the petitioner were entitled to, though, we believe, the claims made by the petitioner in this respect are exorbitant. Under the ruling made by the commissioner that the individual respondents had lost by abandonment whatever rights they had to irrigation water—a ruling which we do not feel at liberty to review in the absence of appeals—those rights must be regarded as having reverted to the Territory, though here, as in the other instances, the evidence does not show what the quantity amounted to. Under all the circumstances it cannot be said that the diversion of the water by the Territory infringes upon the petitioner's right to irrigation water. And we further hold that as the maintenance, at the intake of the Lyons ditch, of the new concrete dam in place of the former rubble dam works no injury to the Territory it need not be restored to its original condition. *Wong Kim v. Kioula*,

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4 Haw. 504; and see *Hilo Boarding School v. Territory*, *supra*. We think it must be obvious that this is as far as the court can go under the circumstances. It doubtless would be an advantage to the parties (particularly the petitioner) if the quantity of water to which the lands of the petitioner are entitled were determined. When, in a case of this kind, the evidence furnishes a reasonably definite basis for determining the quantity or the proportion of the normal flow of a stream or ditch to which certain land is entitled, either by time or quantity, it is proper for the court to make a definite adjudication in that respect. It has been held that water appurtenant to land for household purposes may be put to a different use; that water appurtenant to one piece of land may be used on another piece provided no one's rights are infringed by the change; and that improved methods for diverting water may be made use of upon like condition. Nevertheless the authority of the court is limited to ascertaining, determining, defining and enforcing proven rights. The weakness of the petitioner's case lay in the evident impossibility of showing with any reasonable degree of certainty what quantity of water the lands were entitled to by ancient use for artificial purposes. Under ordinary circumstances the burden of showing that a new diversion of water does not prejudice the right of another is upon the party who asserts the right to the new use, but where, as here, the extent of the right possessed by that other is not known to himself, and cannot be ascertained, the new use, if a beneficial one, ought not to be restrained upon merely conjectural grounds. If it should be made to appear in a future proceeding that the normal flow of the Wai-koloa stream has become not more than enough to satisfy the primary right of the lands having appurtenant rights to take water for domestic purposes the further diversion of water by the Territory through its pipe system will have to be curtailed or suspended.



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There remains to be considered only the claim of the petitioner to the right to storm or freshet waters of the Waikoloa stream on the *ahupuaa* of Ouli. Where a stream flows through a single *ahupuaa* it has been decided that as between the *ahupuaa* and *kuleanas* therein, or portions of the *ahupuaa* conveyed without rights to surplus water, the surplus waters of the stream belong to the *ahupuaa*. *Peck v. Bailey*, and *Haw. C. & S. Co. v. Wailuku S. Co.*, *supra*. The question here presented, as to the rights in the surplus waters of a stream which flows from one *ahupuaa* into another, is one of first impression. We think it must be settled according to the principles applicable to riparian rights at common law. That is to say, each *ahupuaa* is entitled to a reasonable use of such water, first, for domestic use upon the upper *ahupuaa*, then for the like use upon the lower *ahupuaa*, and, lastly, for artificial purposes upon each *ahupuaa*, the upper having the right to use the surplus flow without diminishing it to such an extent as to deprive the lower of its just proportion under existing circumstances. Gould on Waters (3d ed.) Secs. 206 et seq.; 3 Farnham on Waters, Sec. 600 et seq.

We hold therefore, that subject to the vested appurtenant rights of the petitioner and the individual respondents (who were not defaulted) to water for domestic use upon their respective lands, and subject further to the right of the petitioner to water for artificial purposes as below stated, the Territory is the owner of all the waters of the Waikoloa stream to the extent of the ordinary or normal flow; that the Territory lawfully maintains the dam and pipe system whereby it diverts water from the stream for the purpose of supplying the homesteaders and villagers of Waimea with water for domestic purposes not exceeding 700,000 gallons per twenty-four hours; that the lands of the petitioner and the individual respondents are en-



## Syllabus.

titled, in accordance with ancient custom, to water from the stream for domestic use; that the petitioner is entitled to the surplus normal flow, if any, after all domestic requirements are satisfied, for artificial purposes to the extent of the quantity to which the lands owned by him were entitled for such purposes by custom at the time the lands first passed into private ownership, whatever that quantity was; that the petitioner may maintain the concrete dam in its present condition at the intake of the Lyons ditch; and that the surplus flood and freshet waters of the Wai-koloa stream are subject to the reasonable use of both the government and the petitioner as owners respectively of the *ahupuaas* of Waimea and Ouli, for the purposes and in the manner above stated.

A decree conforming to the foregoing views may be entered.

*W. B. Lymer* for petitioner.

*A. Perry* (*A. G. Smith*, Deputy Attorney General, with him on the brief) for respondent.

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IN THE MATTER OF THE CONTEMPT OF GOO WAN  
HOY.

No. 1048

MOTION FOR LEAVE TO INTRODUCE NEWLY DISCOVERED  
EVIDENCE.

ARGUED NOVEMBER 12, 1917.

DECIDED NOVEMBER 17, 1917.

ROBERTSON, C.J., QUARLES AND COKE, JJ.

COURTS—*circuit court—circuit judge at chambers—judgment.*

Where upon an appeal to the supreme court the record in the case is in such condition that it is difficult to ascertain therefrom

## Opinion of the Court.

whether the judgment appealed from was that of a circuit court or of a circuit judge at chambers, the case having gone to final judgment without any question as to jurisdiction being raised, the nature of the proceeding may be looked to as a determining factor on the question as to in what court the proceeding was had.

CONTEMPT—*appeal—newly discovered evidence.*

On the hearing of an appeal from a judgment of conviction of contempt of court only questions of law may be considered, and newly discovered evidence cannot be admitted.

*Per Curiam:* Goo Wan Hoy appealed to this court from a judgment finding him guilty of contempt of court and sentencing him to imprisonment for thirty days. Pending hearing of the appeal the appellant has filed a motion for leave to introduce certain newly discovered evidence. That the evidence proposed to be offered is newly discovered and material to the issue is not disputed, but the attorney general contends that it is not admissible in this court on the appeal. The attorney general further expressed the view that the contempt proceeding was heard in the circuit court—not by the circuit judge at chambers—and, hence, that an appeal does not lie from the judgment, but stated that he had not raised the point because he was satisfied that in no event could the evidence be received in this court. We deem it necessary, however, to ascertain at the outset whether the appeal is properly here since, if the proceeding below was had in the circuit court an appeal does not lie from the judgment. *Kahului R. Co. v. Haw. C. & S. Co.*, 11 Haw. 749; *Western Nat. Bank v. Peacock*, 18 Haw. 161. The record in the case is in an uncertain and unsatisfactory condition. The information which was the basis of the proceeding was entitled in the circuit court of the first judicial circuit, but the citation was in the form of a chambers summons issued in the name of the second judge of the first circuit court, and notified the accused to appear “in my courtroom,” etc. The judgment was entitled in the circuit court and signed by the clerk, but the mit-

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timus recited that the accused was adjudged guilty of contempt of court at a hearing "at chambers." The clerk's minutes of the proceedings were entitled on one day in the circuit court and on another in the circuit court at chambers. In this confused state of the record we think that as the matter had gone to final judgment without any question being raised as to where the proceeding was had we may properly look to the nature of the proceeding as a determining factor. The contempt was alleged to have been committed during the hearing of a suit in equity. The contempt, if committed, then, was of the circuit judge at chambers, and the proceeding was a summary one had pursuant to the provision of the latter part of section 4052 of the Revised Laws. We hold that the rule that one court cannot punish a contempt against another court (9 Cyc. 30) applies to the punishing of contempts under our statute at least so far as summary proceedings are concerned. It follows, therefore, that as the alleged contempt was of a circuit judge sitting at chambers, the summary proceeding for its punishment could be had only before the judge at chambers, and we conclude that the doubt arising from the condition of the record should be resolved in favor of the view that the contempt proceeding was heard by the judge at chambers. An appeal is a proper method by which to have reviewed a judgment of a circuit judge at chambers. R. L. 1915, Sec. 2508; *ex parte Ah Oi*, 13 Haw. 534.

The movant relies upon section 2509 of the Revised Laws which provides that upon an appeal from a decree or judgment of a circuit judge at chambers wherein the facts as well as the law are reviewed "the appellate court may, in case evidence is offered, which is clearly newly discovered evidence and material to the just decision of the appeal, admit the same." Section 4056, however, which relates to the review of judgments in contempt cases, pro-

## Syllabus.

vides that "on any such appeal or other proceeding for review only questions of law shall be considered." Taking the two statutory provisions together we think that the special provision of the latter must be regarded as constituting an exception to the general provision of the former. The intention of the legislature being, as we gather it, that upon an appeal from a chambers judgment in a contempt case the facts are not to be reviewed as in other cases of appeals, but that the review is to be limited to a consideration of points of law. This being so it would be entirely out of harmony with the theory of appeals in contempt cases to admit new evidence in this court. Indeed, as the evidence could not be considered, it would be useless to admit it.

The motion is denied.

*J. Lightfoot* for the motion.

*I. M. Stainback*, Attorney General, contra.

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HOFFSCHLAEGER COMPANY, LIMITED, *v.* ARTHUR H. JONES, JULIETTE M. JONES AND D. F. TURIN.

No. 1040.

APPEAL FROM DISTRICT MAGISTRATE OF HONOLULU.

ARGUED NOVEMBER 14, 1917.

DECIDED NOVEMBER 23, 1917.

ROBERTSON, C.J., QUARLES AND COKE, JJ.

MECHANICS' LIENS—*when attached under sections 2863 and 2864 R. L.*

A mechanic's lien comes into existence at the time notice of the claim of lien is filed in the proper clerk's office and does not relate back to the time when the labor or materials were furnished.

Opinion of the Court.

JURISDICTION—*district court—question of title to real estate.*

The inhibition contained in the proviso of section 2297 as to district courts exercising jurisdiction in actions in which the title to real estate shall come in question is to the action as a whole and as to all of the parts thereof.

SAME—*same—same.*

Plaintiff in an action in the district court commenced to enforce a mechanic's lien alleged that after the materials for which the lien is claimed were furnished, but before notice of lien was filed and served, the defendant J., without consideration and to defraud plaintiff of his lien, conveyed through an intermediary to his wife (one of the defendants) the premises upon which the lien is claimed; the wife filed a plea to the jurisdiction of the court upon the ground that title to real estate is involved, supported by affidavit tending to show that the transaction was *bona fide*, for a valuable consideration, and without knowledge of liability of the premises as to the lien claimed: Held, that the district court correctly sustained the plea and dismissed the action.

OPINION OF THE COURT BY QUARLES, J.

(Robertson, C.J., dissenting.)

The plaintiff commenced this action in the district court of Honolulu against Arthur H. Jones, his wife Juliette M. Jones, and D. F. Turin, to recover the value of materials furnished by plaintiff to said Turin as contractor to be used in and actually used in the construction of a certain building constructed by said contractor under contract with defendant Arthur H. Jones upon certain described premises. The amended complaint among other things alleges:

"That on to wit the said 26th day of September, A. D. 1914, said Arthur H. Jones, was the owner in fee simple absolute of the said premises described in said Schedule "A" and so continued until the 8th day of October, 1914, when he did, by mesne conveyances, convey the same to his wife, Juliette M. Jones, one of the defendants above named, said mesne conveyances consisting of a conveyance by the said Arthur H. Jones to one David Anderson, and from the said David Anderson to Juliette M. Jones; that said conveyances from said Arthur H. Jones to said

## Opinion of the Court.

David Anderson and from said David Anderson to said Juliette M. Jones, aforesaid, were, and are, respectively without consideration and fraudulent and void, and were made by the respective grantors therein, and were received by the respective grantees thereunder, with the intention and for the purpose of hindering and defrauding and delaying the plaintiff and other laborers and materialmen entitled to enforce a lien for the labor and material, respectively, performed and furnished to, for and upon said building from enforcing his or their lien, upon the said building and the interest of the owner, Arthur H. Jones, aforesaid, in the premises upon which the same was situated."

The defendant Juliette M. Jones filed her plea to the jurisdiction of the district court on the ground that the title to real estate is involved and will necessarily come in question, supported by affidavits. The district magistrate sustained the plea and entered judgment dismissing the action, taking the view that a title to real estate being involved or in question jurisdiction to try the action is not vested in the district court. From the judgment dismissing the action the plaintiff has appealed to this court on points of law, seven in number, which are stated in an argumentative way, but, when analyzed, resolve into two points, to wit, Is the title to real estate involved or in question? Should the court have retained the cause and tried it as to the contractor, the defendant Turin?

In the allegations of the amended complaint it appears that the defendant Arthur H. Jones owned the premises at the time the building contract was entered into and up to the time of the completion of the building, and that after the building was completed and before the plaintiff filed its claim and notice of lien in the office of the clerk of the circuit court he and his wife conveyed the premises to David Anderson who conveyed the same to defendant Juliette M. Jones, wife of said Arthur H. Jones. This conveyance is alleged in the amended complaint to be with-

## Opinion of the Court.

out consideration, fraudulent and void and made for the purpose of defrauding the plaintiff and that it was received for said purpose by the defendant Juliette M. Jones. In the affidavits in support of the plea to the jurisdiction of the court it is stated by the affiants that Juliette M. Jones took the said deed in good faith, for a good and valuable consideration and without knowledge of liability of the premises for any liens for labor or materials. It is thus seen that both parties agree that before the claim and notice of lien was filed the premises had been deeded by Arthur H. Jones, through said Anderson, to his wife Juliette M. Jones. The plaintiff attacks this transaction as fraudulent and void and defendant Juliette M. Jones seeks to uphold its validity as against the claim of plaintiff. If the deed is valid, made in good faith and without intent to defraud the plaintiff, it conveyed the title to Juliette as against the claim of the plaintiff; if it is void as against the plaintiff for the reasons assigned it did not convey the title to the premises to Juliette as against the plaintiff. The question of its validity was involved and with it the question of title to real estate upon which plaintiff was seeking to enforce a lien. That was an issue and so tendered by the plaintiff, and one necessary to be determined before the plaintiff could be awarded a judgment enforcing its asserted lien against the premises unless it be that under our statutes the conveyance of title from the building owner to another after the construction of the building, but before the filing of the notice of lien in the proper clerk's office, would not be affected by such conveyance on the theory that the lien, when perfected by filing and service of the notice thereof, relates back to the time the labor is performed or materials furnished. This question must be determined by the provisions of our statutes and the force and effect given to them. Section 2863, R. L., provides the circumstances under which

## Opinion of the Court.

a lien may be acquired for labor and materials furnished, or either, to be used in the building, and which have been used therein. Section 2864, R. L., provides as follows:

“The lien provided in section 2863 shall not attach unless a notice thereof shall be filed in writing in the office of the clerk of the circuit court, where the property is situated, and a copy of the notice be served upon the owner of the property. Such notice shall set forth the amount of the claim, the labor or material furnished, a description of the property sufficient to identify the same, and any other matter necessary to a clear understanding of the same. The lien shall continue for forty-five days, and no longer, after the completion of the construction or repair of the building, structure, railroad or other undertaking against which it shall have been filed, unless the same shall have been satisfied, or proceedings commenced to collect the amount due thereon by enforcing the same.”

Unlike nearly all mechanics' lien statutes our statutes do not provide that the lien shall commence with the beginning of the labor or the furnishing of materials, but do provide that it shall not attach unless the notice of lien is filed as required by the statute and a copy served upon the owner of the property. In *Lucas v. Redward*, 9 Haw. 23, this court, at page 25, said: “It seems clear to us that under our statute the lien does not attach, i. e., does not exist unless the notice is filed. The lien shall have force only from the date of filing; it is called into existence by the filing of the notice; before this it had no force or effect and was not binding upon any one.” In *Kenny v. Gage*, 33 Vt. 302, the court, at page 306, said: “The statute provides that the lien shall attach from the time of filing the claim in the town clerk's office. This of course precludes the idea of its having effect by relation to disturb any rights, either legal or equitable, that may have been created prior to that time. Up to the time of the filing of such claim the property sought to be subjected to such lien may be dealt with in all respects as fully



## Opinion of the Court.

and freely as if it was not liable to be thus subjected." Phillips on Mechanics' Liens (2 ed.) at section 222, says: "The mechanics' lien is occasionally made to date from the time the notice is filed. \* \* \* If, before the lien be thus fixed, a third person obtains a valid title to the property by some legal mode of conveyance and the mechanic has constructive notice thereof by registration of the conveyance or actual notice, the lien is defeated." See also *Quimby v. Sloan*, 2 E. D. Smith 594; *Sisson v. Holcomb*, 58 Mich. 634; *Noyes v. Burton*, 29 Barb. 631; *Cotton v. Holden*, 1 MacArthur 463; *Bond Lumber Co. v. Masland*, 34 So. (Fla.) 254; *Tucker v. Ormes*, 1 MacArthur 652; *Martin v. Clark*, 46 So. (Ala.) 232; *Sinclair v. Fitch*, 3 E. D. Smith 677.

We feel constrained to follow the rule announced in *Lucas v. Redward*, *supra*, and hold that the lien has no existence until notice thereof is filed in the proper clerk's office. It follows that if the title claimed by Mrs. Jones is valid as against the plaintiff the plaintiff has no lien against the premises, hence she was a proper party to the action and to bind her it was necessary to make her a party defendant. It is held in *Gross v. Daly*, 5 Daly 540, that where the owner fraudulently conveys the premises after the labor or materials are furnished, but before the lien is filed the fraudulent transferee may be made a party and the validity of his title adjudicated. In this jurisdiction it is held that a transfer to defraud a creditor is void as to the creditor and the *bona fides* of the transfer may be adjudicated in an action at law (*Dee v. Foster*, 21 Haw. 1; *Lewers & Cooke v. Jones*, 23 Haw. 21), but to do so it is clearly necessary to have the alleged fraudulent transferee before the court in order to bind him. We are unable to segregate the question of ownership from that of title. We are clearly of the opinion that title to real estate was in question for which reason the district court

Robertson, C.J., dissenting.

was without jurisdiction. See *Harrison v. McCandless*, 22 Haw. 129, and authorities therein cited.

It is urged, however, that if the title to real estate is involved the plea to the jurisdiction should have been sustained only as to Mrs. Jones and that the court had jurisdiction as to the contractor and should have tried the case as between the plaintiff and such contractor. In section 2297, R. L., we find the proviso as to district courts "that such courts shall not have cognizance of real actions, nor actions in which the title to real estate shall come in question." The inhibition is to the action as a whole and not to certain features of it or certain parties thereto. The district court has jurisdiction of the action as a whole and as to all of the parties or it has no jurisdiction of it at all. The amended complaint, the plea to the jurisdiction and the affidavits in support of the plea show conclusively that the title to real estate is in question and the district magistrate correctly sustained the plea and dismissed the action.

Judgment affirmed.

*E. C. Peters* for plaintiff.

*R. B. Anderson* (*Frear, Prosser, Anderson & Marr* on the brief) for defendants, Arthur H. and Juliette M. Jones.

DISSENTING OPINION OF ROBERTSON, C.J.

I respectfully dissent. Section 2297 of the Revised Laws provides that the district courts shall not have jurisdiction of "real actions, nor actions in which the title to real estate shall come in question." The question raised by the pleadings was whether or not the conveyance made by Jones to his wife through an intermediary was a fraud upon the rights of the plaintiff, and it would have required the magistrate to decide whether the plaintiff's right to assert a lien had been defeated. The decision of that ques-

Robertson, C.J., dissenting.

tion would not involve the consideration of a disputed title to land. It must be conceded that prior to October 8, 1914, Mr. Jones was the owner of the land, and that from and after that date Mrs. Jones was the owner. It is well settled that a conveyance though void as to creditors is binding between the parties to the conveyance and their privies, and valid as to all third parties whose rights were not prejudiced by the transfer. If the conveyance to Mrs. Jones was good as against the plaintiff the right to a lien was cut off and no relief could be had against the property. If the conveyance was void as to the plaintiff the property would be regarded for the purposes of this case as still belonging to Mr. Jones, and if the lien should be established it would be satisfied by the levy of execution upon the property as though no conveyance of it had been made. *Dee v. Foster, supra*. The conveyance would not be disputed, it would simply be ignored. To decide whether certain land is subject to a mechanic's lien is not to pass upon a disputed title to the land. *Wheatly v. Blalock*, 9 S. E. (Ga.) 168; *Bailey v. Winn*, 101 Mo. 649, 658. From the standpoint of Mrs. Jones the question was not whether the title to the land had passed to her, but whether or not it passed subject to a lien in favor of the plaintiff. In my opinion the demurrer to the plea to the jurisdiction ought to have been sustained.

The question whether there was a misjoinder of parties defendant is not presented by the appeal, and I prefer not to express an opinion as to whether the joinder of Mrs. Jones, between whom and the plaintiff or Turin, the contractor, there was no contractual relation, was consonant with the theory of our mechanics' lien statute or the practice in the courts of this Territory.

## Syllabus.

S. W. NAWAHIE, BY HIS NEXT FRIEND, AKALA  
LAMNUI *v.* GABALIELA KAMALANI.

No. 1031.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.  
HON. C. W. ASHFORD, JUDGE.

ARGUED NOVEMBER 15, 1917.

DECIDED NOVEMBER 24, 1917.

ROBERTSON, C.J., QUARLES AND COKE, JJ.

INSANE PERSONS—*person mentally incompetent to transact business affairs—suit brought in name of next friend or guardian ad litem—proceedings.*

A next friend may institute a suit for a person who is alleged to be mentally incompetent, but where an issue is raised by the party's denial of such mental incompetency the issue thus raised is properly determined by the court *in limine* before further steps are taken in the suit.

TRIAL—*judicial inquiry.*

Upon an inquiry *in limine* regarding the status of a person alleged to be mentally incompetent a judicial hearing is required and the taking of the evidence of but one witness followed by a refusal on the part of the court to hear any other or further evidence falls short of a judicial inquiry as contemplated by the law.

## OPINION OF THE COURT BY COKE, J.

In April, 1917, the appellant Akala Lamnui, as the next friend of S. W. Nawahie, filed a bill in equity alleging mental weakness and incapability on the part of Nawahie and his susceptibility to the undue influence of designing persons, further averring that in February, 1917, the respondent Gabaliela Kamalani, through the exercise of undue influence over the mind of Nawahie, caused Nawahie to execute to him a deed by which for the consideration of one dollar and love and affection all real and personal

## Opinion of the Court.

property owned by Nawahie and situated in the Territory of Hawaii was transferred to Kamalani. It is further averred that this property is extensive and very valuable; that said Akala Lamnui is a second cousin and the nearest relative of Nawahie, and that the same Gabaliela Kamalani is not related either by consanguinity or affinity to said Nawahie. Numerous allegations are contained in the bill reciting alleged facts tending to show the mental incapacity of Nawahie and the prayer thereof asks that the deed from Nawahie to Kamalani be adjudged to be null and void. The respondent Kamalani interposed a demurrer to the bill of complaint upon which no action has been taken by the circuit judge. Nawahie appeared and moved to dismiss the bill of complaint averring in his motion that the suit was instituted and filed without his authority, knowledge or consent, and is being maintained and continued without his authority or consent and that he disapproves of its institution and does not desire its maintenance or continuance, but on the contrary desires it to be terminated and dismissed. He further alleges in his motion that he is of sound mind and mentally competent to institute, prosecute, terminate, withdraw and discontinue said suit and said bill of complaint and to protect all of his interests in the property involved thereunder and to transact all matters of business. This motion was accompanied by the affidavit of Nawahie which substantially recounts the matters contained in the motion. Thereafter the issues raised by the motion, to wit, whether Nawahie was mentally competent to conduct his own business affairs, or whether on account of mental infirmity the suit should properly be maintained for him by a next friend, came on for hearing before the circuit judge. The trial judge proceeded upon the theory that this question should be disposed of *in limine* and that the burden of establishing the mental status and condition of Nawahie was upon

## Opinion of the Court.

the person claiming the right to appear and conduct the cause as his next friend.

In this inquiry counsel for the next friend first called Nawahie, who was subjected to a lengthy examination. At the conclusion of the testimony of this witness counsel for the next friend called another witness, but early in the examination was stopped by the judge who held in effect that he would hear no further testimony of whatsoever nature, having already become convinced by the testimony and appearance of Nawahie that he was of sound mind and in all respects mentally competent to transact his own affairs. The judge peremptorily declined to hear further evidence and proceeded to grant the motion and dismissed the suit. Akala Lamnui comes to this court on appeal from the order of the judge thus made.

There can be no question that the mental status of Nawahie became an issue and the trial judge properly proceeded upon the theory that this issue should be determined *in limine*. Such is the law as expressly stated by this court. See *Kalaniana'ole v. Liliuokalani*, 23 Haw. 457, 468. Following the discussion of other questions the court in *Isle v. Cranby*, 199 Ill. 39, 46, says: "The next question that arises on this record is, what is the proper course to pursue in case the person who is alleged to be of unsound mind appears in court and protests that he is not of unsound mind and that the suit was instituted and prosecuted without his authority and against his will, and asks that the same be dismissed? The presumption is that all adult persons are of sound mind and capable of managing their own affairs and caring for their estate, and the mere fact that it is alleged in an affidavit filed in support of a motion by a person asking that he be appointed the next friend to a particular person who, it is alleged, is of unsound mind and not capable of taking care of his own affairs, does not destroy that presumption.

## Opinion of the Court.

Neither would such presumption be rebutted by the order of the court, based upon *ex parte* affidavits, appointing such person and permitting him to file a bill in the name of and on behalf of the person who is alleged to be of unsound mind, as his next friend. Such motions are usually made in behalf of persons alleged to be of unsound mind by some friend, and it is presumed, we think, in the absence of anything appearing to the contrary, that whatever consent to the bringing of the suit such person is capable of giving has been obtained, and that it is, in fact, his suit; but when he makes known to the court that it is not his suit,—that he is competent to take care of his own affairs and that the supposed friend is a mere intermeddler,—what should the court do? The individual liberty of the person is involved and his right to dispose of his property as he may see fit. These are rights which he cannot be deprived of by any court, unless it be made to appear that by reason of the condition of his mind he has become incapable of taking care of his property. We see no reason, however, under our practice, why this question cannot be properly disposed of in the cause then pending in court, either by the chancellor or by submitting the question to a jury, should a jury be demanded.” It was held in the case of *Kalanianaʻole v. Liliuokalani*, *supra*, that this issue should be determined by *judicial inquiry* and we are of the opinion that both reason and the great weight of authority sustain this ruling.

It therefore follows that there is but one question presented for our consideration by the record in this case, to wit, was a fair judicial inquiry upon the issues had when but a sole witness (the alleged incompetent) was permitted to testify; or did the trial judge abuse his discretionary power in peremptorily terminating the inquiry upon the conclusion of the evidence of this witness and by refusing to hear any other evidence and by dismissing

## Opinion of the Court.

the suit? Counsel for respondent appears from the record herein to have been prepared and anxious to present other evidence, but was denied the right to so do by the ruling of the trial judge, following which the judge ordered a dismissal of the suit. This action of the judge is the burden of appellant's grievance for which she now seeks the interposition of this court.

A judicial inquiry contemplates an adjudication of the adverse claims. It corresponds to a judicial hearing and implies a judicial examination of the issues between the parties, whether of law or of fact; the receiving of facts and arguments and the right to adduce testimony. See 21 Cyc. 408. A trial judge may in any proceeding properly refuse to hear cumulative evidence upon a question already fully established, but it is our opinion that no court has a right in the trial of an issue, after a single witness has testified in relation thereto, to deny the party having the affirmative of the issue the right to present any other or further evidence thereon. Such a procedure, in our opinion, falls far short of a judicial inquiry as contemplated by the law.

The ruling and order appealed from is reversed and the cause remanded to the circuit judge for further proceedings not inconsistent with the views herein expressed.

*J. Lightfoot* (*Lightfoot & Lightfoot* on the brief) for Akala Lamnui.

*C. F. Peterson* for S. W. Nawahie.



Syllabus.

JOHN FERRAGE v. HONOLULU RAPID TRANSIT  
AND LAND COMPANY, A CORPORATION.

No. 1043.

ERROR TO CIRCUIT COURT, FIRST CIRCUIT.  
HON. C. W. ASHFORD, JUDGE.

ARGUED NOVEMBER 13, 1917.

DECIDED NOVEMBER 28, 1917.

ROBERTSON, C.J., QUARLES AND COKE, JJ.

**NEGLIGENCE—proximate cause—question for court or jury.**

Where the facts are undisputed and but one reasonable inference can be drawn therefrom it is the duty of the court to pass on questions of negligence, contributory negligence and proximate cause as questions of law.

**SAME—automobiles—duty of driver at street crossings.**

The duty to observe ordinary care requires that the driver of an automobile must anticipate the possibility of meeting pedestrians or other vehicles at street crossings and have his machine under such control as may be necessary to avoid collision. The mere sounding of a horn is not a sufficient precaution when the circumstances demand that speed be slackened or the machine be stopped.

**SAME—contributory negligence—the last clear chance.**

Where the evidence shows negligence on the part of both plaintiff and defendant, in order that the rule of "the last clear chance" may be applied, the plaintiff either must have been in actual peril and unable to extricate himself, or in immediate danger of getting into peril to the knowledge of the defendant, and there must have been a reasonable opportunity thereafter for the defendant to have averted injury, otherwise, the negligence of plaintiff and defendant being concurrent at the time of the injury, the plaintiff's negligence is to be regarded as a proximate cause of the injury, and the plaintiff cannot recover.

**SAME—contributory negligence—wilful injury by defendant.**

The rule that contributory negligence of the plaintiff does not preclude the recovery of damages where the injury was caused by the wilful act of the defendant has no application in a case where the gravamen of the plaintiff's complaint was negligence—not wilfulness—and the case was tried on the theory of negligence on the part of the defendant.

## Opinion of the Court.

## OPINION OF THE COURT BY ROBERTSON, C.J.

This case is before the court upon a writ of error to review a judgment entered in favor of the defendant in the circuit court.

The action was one for damages for an injury alleged to have been caused by the negligent operation of a street car belonging to the defendant corporation which caused a collision between the car and an automobile belonging to and driven by the plaintiff. Paragraph VII of the plaintiff's complaint alleged,

"That the said defendant, through its agents and employees, so negligently operated said street car No. 9, by propelling the same at an unlawful rate of speed, to wit at approximately eighteen to twenty miles an hour, without sounding any bell or gong as aforesaid, and without sounding any alarm or giving any warning that the plaintiff could or did hear, and without yielding to plaintiff the right-of-way over said Merchant Street, as required by law, that said street car No. 9 was wrongfully, negligently and in utter disregard of the safety and rights of the plaintiff, and being beyond the proper control of said motorman, and without fault upon the part of the plaintiff, driven forcibly against and collided forcibly with plaintiff's said automobile and, through the force of the impact of the collision of said street car with said automobile, the plaintiff's said automobile was entirely wrecked and destroyed beyond the possibility of any repair whatsoever, and the plaintiff was thereby violently thrown and hurled against the driving-wheel of said automobile, and was thereby badly bruised, wounded and injured, all of which was in contravention of plaintiff's private rights under the law."

And paragraph VIII of the complaint alleged, "That at the time of the said collision and injuries the plaintiff acting under the authority and by the directions and instructions of said police authorities, as aforesaid, was operating his said automobile in a careful and prudent manner and said collision and resultant injuries were not

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caused by any negligence whatsoever upon the part of the plaintiff, and the same could have been avoided by the use of ordinary diligence and prudence upon the part of the defendant and its agents and employees then and there running and operating said street car, and would have been avoided, had said employees of said defendant been operating said street car at the lawful rate of eight miles per hour."

The case went to trial in the court below before a jury, and at the close of the case for the plaintiff the defendant moved for a nonsuit upon the grounds that there was no evidence of negligence on the part of the defendant, that evidence which was undisputed and susceptible of but one reasonable inference showed that contributory negligence of the plaintiff was the proximate cause of the injury, and that there was a fatal variance between the allegations of the complaint and the evidence adduced in several particulars. The trial court granted the motion upon the second ground.

The evidence showed, without conflict except as to unimportant circumstances, that at about half-past ten o'clock on the night of March 6, 1917, a car of the defendant company bound down Fort street, in Honolulu, proceeded to cross Merchant street at a rate of speed between 18 and 20 miles per hour; that the motorman operating the car knew or might with reasonable diligence have known that an ambulance or automobile of some kind was also approaching the corner; that no gong was sounded; nor was any attempt made to stop or slow down at the intersection; that the plaintiff, who is a public chauffeur, and had three passengers in his machine at the time, was requested by the deputy sheriff of Honolulu to take an injured man from the vicinity of Victoria street on King street to the emergency hospital; that he proceeded along King and Merchant streets on his way to the hospital, his automobile going at the rate of about

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30 miles an hour, and making no effort to slow down at street intersections; that he was steering the car with his left hand while keeping his right hand on the button which sounded a continuous blast on an extra loud horn; that the horn, on a quiet night, could be heard distinctly at least half a mile away; that upon nearing the corner of Fort street the plaintiff saw the street car come into view as it passed the building (Castle & Cooke's) on the easterly corner of the intersection; that he immediately applied the brakes, but his machine skidded along and crashed into the side of the car; that the car was damaged, the automobile demolished, and the plaintiff injured about the head and legs. There was some conflict in the testimony as to the distance the automobile was from the point of collision when the brakes were put on, one witness testifying that the plaintiff applied the brakes when about 50 or 60 feet from the car track, while the plaintiff himself said the distance was about 18 feet. We think that was unimportant. The plaintiff testified that considering the speed at which he was traveling and the condition of the street, which was smooth and dry, he could have brought the machine to a standstill in about 40 feet. Asked to describe the event, the plaintiff said, "Well, I was coming down Merchant street, with my horn on all the time, just got about Castle & Cooke, just a little further below the — past the corner, I saw the flash of the street car light, and it came so quick on me that I didn't have a chance. I applied my brakes but I didn't have a chance, and crashed at the same moment." He explained that by "the corner" he meant the rear corner of the Castle & Cooke building. Referring to the use of the brakes the plaintiff said, "That is the only chance I had, because if I had turned down I would have went with the street car and my car would have turned over on the street car," and "There was not space enough to turn up." He further

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testified, "I had no chance to swerve. I would have turned my car over and killed everybody in the car if I did." The streets are rather narrow and there was evidence that the intersection in question is known among automobile drivers as a dangerous corner. There was evidence from which the jury could well have found negligence on the part of the motorman, and we agree with the circuit court that undisputed evidence adduced by the plaintiff showed contributory negligence on the plaintiff's part.

Questions of negligence, contributory negligence and proximate cause are usually for the jury to determine, but where the facts are undisputed and but one reasonable inference can be drawn from them it is the duty of the court to pass on them as questions of law. 29 Cyc. 630; *Desky v. Lack*, 11 Haw. 395; *Fuller v. Honolulu R. T. & L. Co.*, 16 Haw. 1, 11; *Dong Chong v. Honolulu R. T. & L. Co.*, 16 Haw. 272. The duty to observe ordinary care requires that the driver of an automobile must anticipate the possibility of meeting pedestrians or other vehicles at street crossings and have his machine under such control as may be necessary to avoid collision. *Brommer v. Pennsylvania R. Co.*, 179 Fed. 577; *Gregory v. Slaughter*, 8 L. R. A. N. S. (Ky.) 1228; *Weidner v. Otter*, 188 S. W. (Ky.) 335; *Rupp v. Keebler*, 175 Ill. App. 619; *Geiselman v. Schmidt*, 106 Md. 580, 585; *Lauson v. Fond du Lac*, 141 Wis. 57, 60. The mere sounding of a horn is not a sufficient precaution if the circumstances demand that speed be slackened or the machine be stopped. *Thies v. Thomas*, 77 N. Y. S. 276, 279. The evidence clearly showed that the plaintiff approached the street intersection at an excessive rate of speed, and without attempting to slow down until the street car came into view, so that it was impossible for him to either stop or turn his car so as to avert the collision. That was negligence as matter of

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law, and the jury could not have said that it did not contribute to the injury. Counsel for the plaintiff seeks to avoid the force of this view of the matter by urging that a plaintiff is not always precluded from recovering damages for a personal injury on account of his contributory negligence. The rule of "the last clear chance" is invoked. "While the negligent act or omission of the person injured ordinarily defeats recovery the rule is subject to the exception or qualification that, although such person has been guilty of negligence in exposing himself to danger, yet he may recover if defendant, after knowing of such danger, could have avoided the injury by the exercise of ordinary care and fails to do so, as in such case the negligence of the person injured is not the proximate cause of the injury and the negligence of the defendant becomes the proximate cause." 29 Cyc. 530; *Ferreira v. Honolulu R. T. & L. Co.* 16 Haw. 615; *Hughes v. McGregor*, 23 Haw. 156. The decisions are not in harmony on the point whether the defendant must have seen the peril of the plaintiff or whether it is enough that he should, in the exercise of reasonable diligence, have known of it. See *Herbert v. Southern Pacific Co.*, 121 Cal. 227; *Cull v. McMillan Cont. Co.*, 178 S. W. (Mo.) 868, 871. In *Nehring v. Connecticut Co.*, 86 Conn. 109, 125, the court said, "Unreasonableness in one's conduct, as a foundation for responsibility to others, cannot justly be established upon the basis of knowledge not possessed. It can with propriety be predicated upon negligence in not having acquired more knowledge. Negligence in this respect, as in all others, implies the existence of a duty to make use of means of knowledge. This duty must be found in the circumstances, and caution must be exercised in order that it, with its consequences, be not raised where the circumstances do not fairly impose it, or be extended beyond the limits which the circumstances fairly justify." There was evi-

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dence that the horn of the plaintiff's automobile was heard by persons on Fort street, and one witness testified that when the defendant's car had crossed King street, a block from the point of collision, he called out to the motorman to "look out for the ambulance." Whether or not the motorman heard what was said did not appear. Under the circumstances the most that the motorman could be charged with was notice that an ambulance or automobile was approaching Fort street from one direction or the other, and he was not chargeable with knowledge that it was coming at a reckless rate of speed or that its driver would not exercise ordinary care in approaching the street intersection. The plaintiff either must have been in actual peril and unable to extricate himself, or in immediate danger of getting into peril to the knowledge of the defendant, and there must have been a reasonable opportunity thereafter for the defendant to have averted injury, otherwise the plaintiff's negligence is to be regarded as a proximate cause of the injury. The courts are in substantial accord upon the point that the rule of "the last clear chance" does not apply where, as here, the negligence of the plaintiff and defendant is concurrent at the time of the injury. 29 Cyc. 531; *Green v. Railroad*, 143 Cal. 31, 41; *Dyerson v. Railroad*, 74 Kan. 528; *Powers v. Des Moines City R. Co.* 143 Ia. 427, 435; *Plinkiewisch v. Portland R. L. & P. Co.*, 58 Ore. 499; *Scharf v. Railroad*, 159 Pac. (Wash.) 797; *Butler v. Railroad*, 99 Me. 149; *Atchison T. & S. F. R. Co. v. Taylor*, 196 Fed. 878; *Clark v. Railroad*, 24 Okla. 764; *Nehring v. Connecticut Co.*, *supra*, p. 121. "If each party is negligent in failing to discover the danger, then the negligence is ordinarily concurring, and the doctrine of last fair chance does not apply." *Bruggeman v. Ill. Cent. R. Co.*, 147 Ia. 187, 205. Counsel for the plaintiff attempts to justify the high rate of speed at which the plaintiff was driving upon the contention that



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the plaintiff having been requested by the deputy sheriff to take an injured person to the emergency hospital, his machine was an "ambulance" or a "vehicle under the control of the sheriff" within the meaning of ordinance No. 63 of the city and county. The ordinance is not in the record but, in so far as it purports to be quoted in the defendant's brief, it lends no support to the argument of plaintiff's counsel. Section 4 of the ordinance which provides that the speed rates shall not apply to "Vehicles, wagons, trucks and apparatus under the control of the chief engineer of the fire department, of the sheriff of the city and county of Honolulu, vehicles of public agencies supplying gas and electricity, and ambulances, public and private, while such vehicles are in the actual performance of duty during emergencies," provides also that "Such exemptions shall not be construed to permit reckless driving at any time." And ordinance No. 64, also referred to, which gives the right of way to private vehicles when employed in carrying sick or injured persons to hospitals provided the driver shall cause to be sounded continuously some adequate sounding device as a warning of the emergency character of its business, excepts vehicles carrying United States mails and the street cars of the defendant company.

Counsel for the plaintiff further invokes the well established rule that contributory negligence of the plaintiff does not preclude the recovery of damages where the injury was caused by the wilful act of the defendant. But a wilful act is not a negligent act, and the gravamen of the plaintiff's complaint in this case was negligence—not wilfulness. The case went to trial on the theory of negligence on the part of the motorman, and we find no evidence in the record to support a claim of wilfulness on his part.



Syllabus.

We find no ground for a reversal of the judgment in the assignments of error relating to rulings upon evidence.

The judgment is affirmed.

*W. B. Lymer* for plaintiff in error.

*A. L. Castle* (*Castle & Withington* and *J. W. Cathcart* on the brief) for defendant in error.

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WONG YOUNG *v.* KUM CHONG, HO SUNG, LOO WING, AH KON AND YECK MAN.

No. 1038.

APPEAL FROM THE ACTING DISTRICT MAGISTRATE OF  
WAILUKU.

SUBMITTED NOVEMBER 27, 1917.

DECIDED NOVEMBER 30, 1917.

ROBERTSON, C.J., QUARLES AND COKE, JJ.

PROCESS—*prayer for in complaint—district courts.*

A prayer that process issue, while proper, is not necessarily a part of the complaint in a case in the district court, and the absence of such prayer is not ground for demurrer.

*Per Curiam*: This is an appeal on points of law from a decision of the district magistrate, the points raised being that the district magistrate erred in sustaining a demurrer to the plaintiff's complaint, said demurrer being on two grounds: First, that summons improperly issued, the complaint containing no prayer for process; and, second, that the complaint is too indefinite and uncertain.

We have no statutory provision requiring complaints in district courts to contain a prayer for the issuance of process. The complaint may be oral (*Larrisch v. Schaefer*,

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6 Haw. 140). Strict rules of pleading do not apply to procedure in district courts (*Holt v. Peacock*, 18 Haw. 502; *Associated Repair Works v. Rogers*, 22 Haw. 91, 94). The defendant may not be adjudged in default for want of a written answer (*Paris v. Vasconcellos*, 14 Haw. 590, 592). We hold that prayer for process, while proper, is not necessarily a part of the complaint in a case in a district court and that process may issue without such prayer in the complaint. But, going beyond this question, the defendants appeared generally and thereby waived all objections, if any they had, as to the summons (*Ferreira v. Kamo*, 18 Haw. 593; *Payne v. Furtado*, 22 Haw. 723, 726) and submitted themselves to the jurisdiction of the district magistrate. The office of a summons is to bring the defendant into court so that the court may have jurisdiction over his person and its object is accomplished when the defendant comes in without objection and submits himself to the jurisdiction of the court. We have examined the complaint and find it good as against the second ground of demurrer.

Judgment reversed and the cause remanded to the district court with instructions to overrule the defendants' demurrer to the complaint and proceed to try the cause.

*H. G. Spencer* for plaintiff.

Syllabus.

EDGAR T. ANDERSON v. HAWAIIAN DREDGING  
COMPANY, LIMITED.

No. 1030

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.  
HON. C. W. ASHFORD, JUDGE.

ARGUED NOVEMBER 26, 1917.

DECIDED DECEMBER 11, 1917.

ROBERTSON, C.J., QUARLES AND COKE, J.J.

CONSTITUTIONAL LAW—*statutes—right to question constitutionality of statute.*

It is a well settled rule that a question of the supposed conflict of a statutory provision with the Constitution will not be considered at the instance of one whose rights do not appear to be affected by such provision, but where a statute which so regulates the correlative rights of two classes—as employers and employees—that if void as to one it should be held void as to the other, complaint of a party belonging to one class may require an examination of the statute in both aspects.

SAME—*Fifth Amendment—due process of law.*

Due process of law requires that when one's rights of life, liberty or property are to be adjudicated he must have notice of the proceeding and be given a hearing—or, at least, an opportunity to be heard—thereon. But so far as the statute providing for the proceeding is concerned it is sufficient if it provides for, or, at least does not negative, the right of the adverse party to notice that the proceeding has been commenced. Notice of the time of hearing must be given the parties by the tribunal before which it is pending whether required by statute or rule or not. The failure to give such notice may invalidate the particular proceeding in which the failure occurred, but will not draw in question the statute.

SAME—*Seventh Amendment—right of trial by jury.*

The constitutional requirement that in suits at common law the right of trial by jury shall be preserved does not extend to other than actions at common law. The right is not invaded where, as in the case of Workmen's Compensation Acts, the common law action for damages for personal injury sustained by employees in industrial employment has been abolished and a new and fixed measure of compensation is fixed by statute.

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SAME—*Workmen's Compensation Act—police power.*

The right of the legislature to establish a new system of compensation for injured employees based upon the theory underlying Workmen's Compensation Acts does not necessarily depend upon whether the employee was engaged in "hazardous" or "extra-hazardous" employment, or on whether he is a skilled or unskilled laborer, or upon the classifying of the different kinds of industrial employment. Nor does it depend on the inclusion in the statute of a provision for a governmental compensation fund to which all employers shall contribute. The legislature having the power to abolish the common law rules with respect to the relations between employers and employees engaged in industrial enterprise for profit in the more hazardous kinds of work, the extension of the new system to all industrial employment is a reasonable and valid exercise of the police power.

## OPINION OF THE COURT BY ROBERTSON, C.J.

The plaintiff, an employee of the defendant, instituted an action in the circuit court on March 27, 1916, to recover damages for personal injuries alleged to have been sustained by him in the course of his employment through the negligence of the defendant in failing to provide a safe place for him to work. The defendant interposed a demurrer to the complaint which asserted, *inter alia*, that the plaintiff's remedy, if any, is exclusively under the provisions of Act 221 of the Session Laws of 1915 (the Workmen's Compensation Act), and that under the provisions of said act, and particularly section 4 thereof, an action for tort or for damages or in trespass on the case or otherwise does not lie for or on account of, or in consequence of, any or all of the acts, injuries and matters alleged in the complaint. Argument was had upon the demurrer as to the validity of the statute in question, the plaintiff taking the position that it lacked due process of law in violation of the Fifth Amendment of the Constitution, and denied the right of trial by jury in violation of the Seventh Amendment. The defendant's contentions were

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upheld by the circuit court; the demurrer was overruled with leave to answer; and an interlocutory bill of exceptions was allowed and certified to this court.

The Workmen's Compensation Act of this Territory is of the compulsory type. Except that it contains no provision for a governmental insurance fund, it follows closely the form for a compulsory act approved by the conference of commissioners of uniform state laws, October, 1914. The act itself provides (Sec. 64) that "The rule that statutes in derogation of the common law are to be strictly construed shall have no application to this act," and, (Sec. 61) that "If any part or section of this act be decided by the courts to be unconstitutional or invalid, the same shall not affect the validity of the act as a whole, or any part thereof which can be given effect without the part so decided to be unconstitutional or invalid." In the case of *Re Ichijiro Ikoma*, 23 Haw. 291, 295, it was said, "Our act, by its terms, is to be liberally construed, and by authority the construction must be a broad one so as to effectuate the purposes of the act."

Counsel for the appellant have raised the question as to whether the appellee is in a position to make the claim that the statute does not require notice to be given in connection with certain of the proceedings, and, therefore, does not constitute due process of law, since, by an affidavit filed by the plaintiff in the court below, it appears that he filed a claim with the industrial accident board, and that the board "after a full hearing" denied the plaintiff a "lump sum for the injuries sustained by him," whereupon the plaintiff appealed to the circuit court, where, apparently, the appeal is still pending, though complaint is made that that court has not prepared or prescribed rules providing the procedure in such cases; also whether the appellee is in a position to say that the act is not a reasonable exercise of the police power because it is not limited in its operation to the more hazardous occupa-

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tions, since it appears from the allegations of the complaint that the plaintiff was employed in a very hazardous occupation at the time of the alleged injury, viz.: in the work of constructing a steel scow wherein, in order to put in and fasten certain plates and bolts, he was obliged to stand upon certain narrow planks about fifty feet above the ground, and from whence he fell. It is a well settled rule that a question of the supposed conflict of a statutory provision with the Constitution will not be considered at the instance of one whose rights do not appear to be affected by such provision. *Territory v. Field*, 23 Haw. 230, 233, and cases there referred to. But the United States supreme court has recognized an exception to the rule which is applicable to cases involving a statute which so regulates the correlative rights of two classes—as employers and employees—that if void as to one it should be held void as to the other, complaint of a party belonging to one class may require an examination of the statute in both aspects. *New York Cent. R. Co. v. White*, 243 U. S. 188, 197. In *Mountain Timber Co. v. Washington*, 243 U. S. 219, 234, the court said, “the employer’s exemption from liability to private action is an essential part of the legislative scheme and the *quid pro quo* for the burdens imposed upon him, so that if the act is not valid as against employees it is not valid as against employers.” In the case at bar the validity of the statute is questioned by the employee, but it is contended that the act not only infringes his constitutional rights, but is unreasonable from the standpoint of employers and, therefore, not a valid exercise of the police power of the Territory. Under the circumstances we think we should consider all the points which have been presented by the appellee.

As to the Fifth Amendment. It is conceded, as it must have been, that “due process of law” requires that when

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one's rights of life, liberty or property are to be adjudicated he must have notice of the proceeding and be given a hearing—or, at least, an opportunity to be heard—thereon. The circuit court held that the statute is deficient in this respect. The reasoning upon which the conclusion was based was set forth in an opinion rendered in another case which has been made part of the record in this case, and has been adopted by counsel for the appellee and quoted in their brief as follows:

“In order to illustrate just how, and to what extent, the Hawaiian statute may be complied with, without, in fact or in law, according to a complaining employee that due process of law which the Constitution requires, it may be useful to chronologically and sequentially summarize the process by which a committee of arbitration, or an industrial accident board, as provided for by the Act in question, may proceed, from the point where a claim for compensation is made, to the point where an award upon such claim shall be rendered and shall become final and binding upon the parties. Beginning with section 21 of the Act we find that the procedure may be as follows:

“A notice by or on behalf of the injured employee must be given to the employer, both of the accident and of the claim, but actual notice by the employer of the accident, injury and claim is deemed the equivalent of such notice from the employee and claimant. A time limit of three months is set for this notice, and without such notice, or its equivalent, (actual knowledge by the employer), no proceedings looking to an award of compensation may be had. (Secs. 21-24.) In the case of mental incompetents and minors unprovided with a guardian or next friend, no time limit for the giving of such notice exists. (Sec. 25.) The industrial accident board appointed under the terms of Sec. 26 has sole jurisdiction of claims for such compensation. Whether or not the proceedings by or before an industrial accident board, or a committee of arbitration, (which may be described as a subsidiary of such board), is purely judicial in character, need not be

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here determined; it is to be noted, however, that although the procedure 'shall be as summary and simple as reasonably may be,' yet the board or its individual members shall have the power to subpoena witnesses, administer oaths, and examine such of the books and records of the parties to a proceeding as relate to the questions in dispute. (Sec. 29.) These functions are certainly judicial in character, whatever be the name of the tribunal by which they are exercised.

"In the event of an agreement being reached between employer and employee, respecting the compensation to be paid for injuries received, a memorandum of such agreement shall be filed with the board, and requires its approval in order to its validity. (Sec. 30.)

"The procedure, in the event that no such agreement is reached, provides for hearing by a committee of arbitration, but whether such procedure is mandatory need not be here decided. The language of the statute is (Sec. 31), that 'either party *may* make an application to the board for the formation of a committee of arbitration.' As above stated, it is understood that, in practice, no such committees have been, or are being formed or appointed in this circuit, but that, on the contrary, the board, in the first instance, and without the intervention of such subsidiary committee, proceeds to hold an inquiry into the facts and circumstances of the alleged accident and injury, and to make an award. It may be that this procedure is valid and binding, but, in any event, its validity is not especially challenged in this case, and need not now be judicially passed upon.

"The committee is composed of three members, constituted as follows: the board nominates one member, who may or may not be a member of the board itself, and the person so nominated shall be chairman of the committee. The other two members shall be named, respectively, by the parties; and if a vacancy occurs, it shall be filled in the same way as the original appointment, (Secs. 31-32).

"The board shall request the parties to appoint their respective representatives, and if within seven days after such request, or after a vacancy has occurred, either party



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does not appoint his representative, the board shall fill the vacancy and notify the parties to that effect. (Sec. 32.) Let us assume (1) that either party has made a formal application to the board for the formation of a committee of arbitration; (2) that the board, acting upon such application, has appointed one of its own members, or a substitute, to act as chairman of such committee; and (3) has requested the parties to appoint their respective representatives; (4) that one or both of the parties, for a period of seven days after such request, has failed to make such appointment; (5) that the board, owing to such failure, has appointed one or two others, as the case may be, to fill the committee; (6) that, in the event of the full committee having been previously nominated and appointed, a vacancy has occurred, and has been filled agreeably to the provisions of Sec. 32; (7) that the parties have finally been notified of the formation and *personnel* of the committee. At this point it is important to observe that all provision for notice to either of the contesting parties is withdrawn. If we assume that the 'requests' to the parties to nominate members of the committee may stand as the equivalent of due notice to them, up to this point, still we find that, under the provisions of Sec. 33 'the committee of arbitration shall make such inquiries and investigations as it shall deem necessary.' There is a provision as to the place for the hearings to be held, namely, in the city or town where the injury occurred, if within this Territory, and 'unless otherwise agreed,' but there is absolutely no provision that the committee, when so formed, or the industrial accident board, in the event that it sees fit to proceed directly with the inquiry, without the interposition of a committee of arbitration, shall serve any notice, of any character whatsoever, upon either of the parties, of the time or place of hearing. On the other hand, the provisions of the statute (Sec. 33) would apparently be fully met and executed if such committee, or such board, should proceed to an *ex parte* hearing, without any notice to either of the contesting parties, and after such hearing, even though it be *ex parte*, and without any knowledge on the part of the claimant, or on the part of

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the respondent, that such hearing is being held, or is even in immediate contemplation, the committee. or the board, as the case might be, may make its award, 'together with a statement of its findings of fact, rulings of law, and any other matters pertinent to the question arising before it.' This award and its accompanying documents shall be filed with the board.

"Up to this point, therefore, we have seen that the procedure provided by statute may be fully complied with without giving notice to either of the contending parties of the hearing intended to be held, and actually had and held upon the claim involved. Obviously, this is not due process of law. But it may be answered that the award may be reviewed before the full board, under the provisions of Section 36. An award having been made, under the provisions of Section 33, it is the duty of the board to notify the parties thereof, and we will assume that this has been done. The rights of either party then are, to apply for a review of the award, and such application may, (Sec. 33), be made within ten days after the sending of the award, (by the board), to the parties; and if no such application for review is made, then the award shall be final and enforceable. Such review may also be had (Sec. 36), if the committee fails to make an award within thirty days after its formation, but there is no provision as to whether the review here contemplated shall be had upon the motion of a party, or upon motion of the board itself. In either event, however, that is, if a review before the full board be had, the full board 'shall make an award which shall be filed with the record of the proceedings and shall state its conclusions of fact and rulings of law, and shall immediately send to the parties a copy of the award.' (Sec. 36.)

"Let it be noticed, that here, again, there is an absolute absence of provision for notice to either party of any hearing before the board which may result either from an application for review by either party, or from the action of the board itself in taking up the claim for adjustment in the event that the committee of arbitration shall have failed, during thirty days after its formation, to make

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and file an award. Quite irrespective of whether a party to the controversy shall request such review, or whether the board shall proceed to a hearing because of the default of the committee of arbitration to make and file an award, it is obvious that there can be no due process of law in connection with such proposed hearing by and before the board, unless a reasonable notice of such hearing shall have been communicated to the respective parties,—and, as above, there is no provision for such notice. As before intimated, and as held by many authorities, some of which will be cited on a later page, there must be a positive provision for the giving of such notice, and it must be complied with, in order to constitute due process of law.”

It is to be observed in the first place that the court fell into error in thinking that “there must be a positive provision for the giving of such notice \* \* \* in order to constitute due process of law.” A number of well considered cases cited in the brief of the appellant hold that if the frame of the statute is such as to permit it, the requirement of notice may be implied, or read into it. See *Plymouth Coal Co. v. Pennsylvania*, 232 U. S. 531, 544; *Kentucky Railroad Tar Cases*, 115 U. S. 321, 334; *Union Pac. R. Co. v. Abilene*, 98 Pac. (Kan.) 224. See also *In re Atcherley*, 19 Haw. 346. In the case of *Carstens v. Pillsbury*, 172 Cal. 572, 578, where the court had before it a provision of the California Workmen’s Compensation Insurance and Safety Act, that “the commission may, with or without notice to either party, cause testimony to be taken,” the court said, “But we do not think the section, when given a reasonable interpretation, authorizes such star-chamber proceedings. It must be read as an entirety, and in the light of the rule that an unconstitutional effect should not be given to it if another meaning is reasonably discoverable from the language. The taking of testimony and the reception of evidence are essentially parts of a hearing. If the commission directs

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it to be done without notice, the right to be present at the hearing will not be given unless, at least, before the trial or hearing is concluded, the report of such testimony and evidence, made to the commission, is exhibited to each party and he is afforded an opportunity, if he so desires, to recall and cross-examine the witnesses and to rebut the evidence reported. The express language of the section is silent on this point, but the declared 'right to be present at any hearing' and to 'present such testimony as shall be pertinent under the pleadings' implies that this shall be done." In the case of *In re Allen*, 82 Vt. 365, cited in the opinion of the circuit court, it was said, "As before seen the statute in question contains no specific provision for notice to the alleged insane person of the institution of proceedings for a court of inquiry to ascertain whether he shall be removed to the hospital for the insane as a state charge. Yet it does not follow that the statute is wanting in due process of law" (p. 372). The court quoted from Mr. Bishop's work on Written Laws to the effect that "a statute will not be interpreted, unless its words are specific requiring it, to authorize judicial proceedings without notice to the party to be affected by them" (id.), and from the case of *Evans v. Johnson*, 39 W. Va. 299, that "Even though the statute be silent as to notice, as ours as to appointment of committees by county courts is, though that as to circuit court appointment requires notice, yet the common law steps in and requires it" (p. 373). And it was held that the statute "should be construed in the light of the requirements of the foregoing principles of the common law, and that so construed the alleged insane person is entitled by law to proper notice of such proceedings and an opportunity to be present and defend," and that the statute as so construed was not violative of the Fourteenth Amendment (p. 374). In two other cases, *State v. Billings*, 55 Minn. 467, and *Matter*

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of *Lambert*, 134 Cal. 626, which, also, were cited in the opinion of the circuit court, the courts having before them statutes which purported to authorize the commitment of insane persons without notice to them, invoked the rule that the test to apply to a statute whose constitutional validity is impeached is not what has been done under it, but what may be done by its authority, and held them to be wanting in due process of law and invalid. The statute here in question, however, does not fall in the class of statutes which are silent on the matter of the giving of notice to the party against whom a proceeding has been commenced. It must be remembered that in making a claim for compensation under the act the employee (or those standing in his stead) is the moving party, and section 21 of the act provides for the giving of notice to the employer against whom compensation is claimed. The faults found by the circuit court were with sections 33 and 36 which do not in terms require that notice be given the parties of the hearing before the committee on arbitration, or of the trial before the industrial accident board on review of an award. But those proceedings of course could only follow the filing of a claim by the employee and notice thereof to the employer. In other words, the sections referred to relate to proceedings to be had after the parties have come or been brought into court, as it were. Our statute on civil procedure (R. L. 1915, Chap. 137) relating to the practice in the circuit courts contains no provision regarding notice to be given parties in pending cases of the proposed trial of a case. Section 2401 provides that causes shall be taken up and disposed of in the order in which they stand upon the calendar, and section 2402 provides for the entry of an order of nonsuit or default in case of the non-appearance of the plaintiff or defendant. A rule of the circuit court of the first circuit (24) contains the provision that "The clerk shall, in

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writing, duly notify the attorneys of the respective parties of the date and hour and before which judge the cases are set for trial," but formerly there was no such requirement in the rules. See 9 Haw. 715. Surely the constitutionality of the statute would not depend on the existence of a rule of court. In *Payne v. Furtado*, 22 Haw. 723, 729, this court held that a garnishee was entitled to notice of hearing without reference to any statute or rule of court. In *Vivas v. Akoni*, 14 Haw. 115, where an appeal had been taken to the circuit court from a judgment of a district court, and the appeal was heard without notice to the appellee the judgment of the circuit court was vacated. Natural justice and the common law, as well as the Constitution, demand that a party whose rights are to be affected shall be given notice of the proceeding. So far as the statute relating to the proceeding is concerned it is sufficient if it provide for, or, at least, does not negative the right of the adverse party to notice of the institution of the proceeding. The proceeding having been properly commenced, notice of the time of hearing must be given to the parties by the tribunal before which it is pending whether required by statute or rule or not. The failure to give such notice may invalidate the particular proceeding in which the failure occurred, but will not draw into question the statute.

The circuit court also found a defect in section 37 of the act which provides that the industrial accident board, on the application of any party, on account of changed conditions, but not oftener than once in six months, may review any agreement or award and end, diminish or increase the compensation, without providing for the giving of notice to the other party. It would seem that the observations made with reference to sections 33 and 36 apply to section 37. If not, it is clear that the provision of the latter section is severable and, if invalid, would not affect the

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rest of the statute. Furthermore, no proceeding was had under that section with reference to the claim of the plaintiff in this case, and no importance seems to be attached to the point by counsel for the appellee. We hold that the statute is not lacking in due process of law upon any of the grounds which have been urged in connection with the requirements as to notice. It is not claimed that the plaintiff was not, in fact, heard upon his claim by the industrial accident board.

As to the Seventh Amendment. The circuit court held, and counsel for the appellee contend, that the statute, in providing for the awarding of compensation to injured employees according to a scale based upon the nature of the injury and the amount of wages received by the employee, deprived the plaintiff of the right to have his damages assessed by a jury in violation of the constitutional provision. The right to a trial by jury as to questions other than the measure of compensation is afforded by section 38 of the act which allows appeals to the circuit court. The provision of the Seventh Amendment is that "In suits at common law \* \* \* the right of trial by jury shall be preserved." The requirement does not extend to other than actions at common law. See *McElrath v. United States*, 102 U. S. 426; *Guthrie Nat. Bank v. Guthrie*, 173 U. S. 528; *Territory v. Hart*, 23 Haw. 558. The prosecution of a claim for compensation under the statute, of course, is not an action at common law, so that the question raised in this connection goes to the power of the legislature to abolish the common law relations between employers and employees and to substitute a new remedy in cases of personal injury sustained by an employee in the course of his employment by the method followed in Workmen's Compensation Acts in general. Without attempting to enlarge upon the subject, we think it enough to observe that the constitutional validity of



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the principle upon which Workmen's Compensation Acts are based has been definitely settled by the decisions of federal and state courts. *New York Cent. R. Co. v. White*, 243 U. S. 188; *Hawkins v. Bleakly*, id. 210; *Mountain Timber Co. v. Washington*, id. 219; *State v. Clausen*, 65 Wash. 156; *Cunningham v. Northwestern Imp. Co.*, 44 Mont. 180; *State v. Creamer*, 85 Oh. St. 349; *Western Ind. Co. v. Pillsbury*, 170 Cal. 686; *Adams v. Iten Biscuit Co.*, 162 Pac. (Okl.) 938; *Hunter v. Colfax Con. Coal Co.*, 154 N. W. (Ia.) 1037; *Borgnis v. Falk Co.*, 147 Wis. 327. See also *Second Employer's Liability Cases*, 223 U. S. 1. In the case of *Ives v. South Buffalo R. Co.*, 201 N. Y. 271, cited in the opinion of the circuit court and in the brief of the appellee, it was held that while it is within the scope of legislative power to change or abolish the rules of the common law with reference to injuries resulting from the negligence of fellow servants and contributory negligence of the person injured, the legislature could not abolish the rule that an employee assumes the ordinary and obvious risks incident to his employment and special risks arising out of dangerous conditions which were known and appreciated by him; and that a statute which imposes upon an employer, who has omitted no legal duty and has committed no wrong, a liability based solely upon a legislative determination that his business is inherently dangerous, is not a valid exercise of the police power, but constitutes a deprivation of property without due process of law. But that case, though decided as recently as 1911, has already become obsolete, partly by reason of an amendment to the state constitution, and principally through the exposure of the fallacious reasoning upon which the court based its final conclusion. It must now be regarded as decisively settled that the common law rule respecting the assumption of risk as well as the other rules relative to the rights and liabilities of employer and employee may



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be altered by legislation, at least if some reasonably just substitute be provided. On the point as to the constitutional right to a trial by jury where the legislature has replaced the common law theories with a new system of compensation, the court, in *Jensen v. Southern Pacific Co.*, 215 N. Y. 514, 526, said,

“It is not accurate to say that the employee is deprived of all remedy for a wrongful injury. He is given a remedy. To be sure, the compensation or recovery is limited, and that in a sense may possibly constitute a taking; but if so, it is his contribution to an insurance scheme designed for his benefit, and may be justified on precisely the same grounds as the contribution exacted of the employer has been. When he enters into the contract of employment, he is now assured of a definite compensation for an accidental injury occurring with or without fault imputable to the employer and is afforded a remedy, which is prompt, certain and inexpensive. In return for those benefits he is required to give up the doubtful privilege of having a jury assess his damages; a considerable part of which, if recovered at all after long delay, must go to pay expenses and lawyers’ fees.”

In *State v. Clausen*, *supra*, at p. 210, the court said, “The right of trial by jury accorded by the constitution, as applicable to civil cases, is incident only to causes of action recognized by law. The act here in question takes away the cause of action, on the one hand, and the ground of defense, on the other; and merges both in a statutory indemnity, fixed and certain. If the power to do away with a cause of action in any case exists at all, in the exercise of the police power of the state, then the right of trial by jury is thereafter no longer involved in such cases. The right of jury trial being incidental to the right of action, to destroy the one is to leave the other nothing upon which to operate.”

And in *Mountain Timber Co. v. Washington*, *supra*, at p. 235, the court said, “The Seventh Amendment, with its provision for preserving the right of trial by jury, is invoked. It is conceded that this has no reference to pro-

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ceedings in the state courts, but it is urged that the question is material for the reason that if the act be constitutional it must be followed in the federal courts in cases that are within its provisions. So far as private rights of action are preserved this is no doubt true; but with respect to those we find nothing in the act that excludes a trial by jury. As between employee and employer, the act abolishes all right of recovery in ordinary cases, and therefore leaves nothing to be tried by jury."

We hold that the statute is not in conflict with the Seventh Amendment of the Constitution.

As to the police power. Counsel for the appellee argue that where a statute which deprives persons of property, or the right to contract, or interferes with individual liberty, is sought to be justified as an exercise of the police power it can be sustained only on the view that it constitutes a reasonable restraint or invasion of private rights in the interest of the public welfare. They cite the cases of *Plessy v. Ferguson*, 163 U. S. 537, 550; *Wisconsin, etc., R. Co. v. Jacobson*, 179 U. S. 287, 301; and *New York Cent. R. Co. v. White*, *supra*, where the court said (p. 202), "Of course, we cannot ignore the question whether the new arrangement is arbitrary and unreasonable, from the standpoint of natural justice. Respecting this, it is important to be observed that the act applies only to disabling or fatal personal injuries received in the course of hazardous employment in gainful occupation." Counsel contend that in the cases in which Workmen's Compensation Acts of the compulsory type have been upheld they have been sustained as reasonable exercises of the police power because of their classification of industries and the limiting of the application to certain "hazardous" or "extra-hazardous" employments; and it is said that the California act, which is more like the statute of this Territory, received the endorsement of the majority of the supreme court of California (*Western Ind. Co. v. Pills-*

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*bury*) only because it provided for a state compensation fund to which all employers may contribute, and from which fund all injured employees are paid, and so long as the employer contributes to the fund he is under no further liability to his employees.

The right of the legislature to establish a new system based upon the theory underlying Workmen's Compensation Acts does not necessarily depend upon whether the employee was engaged in "hazardous" or "extra-hazardous" employment, or on whether he is a skilled or an unskilled laborer, or upon the making of any such classifications. The acts in which classifications have been made have not been sustained because of them, but in spite of them. Nor does the legislative power depend on the inclusion of a provision for a governmental compensation fund to which all employers shall contribute. In our view the theory of the statute of this Territory that each employer should provide for the compensation of the employees injured in his own employ is every whit as reasonable as that of the California act. Its natural tendency would be to cause greater care and better management on the part of employers of labor.

"The proper administration of Workmen's Compensation Acts necessitates an appreciation of the legislative purpose to abolish the common law system relating to injuries to employes as inadequate to meet modern conditions and conceptions of moral obligations, and substitute therefor a system based on a high conception of man's obligation to his fellow man, a system recognizing every personal loss to an employe, which is not self-inflicted, as an element of the cost of production to be charged to the industry rather than to the individual employer, and liquidated in the steps ending with consumption, so that the burden is finally borne by the community in general. \* \* \* In place of the common law remedy, which involves tedious delays and great economic waste, it has been sought by this legislation to provide a

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certain and speedy method by which injured employes and their dependents may secure, at a minimum of cost and free from certain well established rules of law, compensation which will be more uniform than that awarded by juries, and which, so far as practicable, is regulated as to amount by fixed rules and schedules. A full appreciation of the scope of this legislation cannot be obtained without also taking into consideration the fact that the state has an interest in compensation being awarded that the support of the workmen or his dependents may not become a public charge." 1 Honnold on Workmen's Compensation, Sec. 2.

And in *New York Cent. R. Co. v. White*, *supra*, at pp. 203, 204, the court said, "Reduced to its elements, the situation to be dealt with is this: Employer and employee, by mutual consent, engage in a common operation intended to be advantageous to both; the employee is to contribute his personal services, and for these is to receive wages, and ordinarily nothing more; the employer is to furnish plant, facilities, organization, capital, credit, is to control and manage the operation, paying the wages and other expenses, disposing of the product at such prices as he can obtain, taking all the profits, if any there be, and of necessity bearing the entire losses. In the nature of things, there is more or less of a probability that the employee may lose his life through some accidental injury arising out of the employment, leaving his widow or children deprived of their natural support; or that he may sustain an injury not mortal but resulting in his total or partial disablement, temporary or permanent, with corresponding impairment of earning capacity. The physical suffering must be borne by the employee alone; the laws of nature prevent this from being evaded or shifted to another, and the statute makes no attempt to afford an equivalent in compensation. But, besides, there is the loss of earning power; a loss of that which stands to the employee as his capital in trade. This is a loss arising out of the business, and, however it may be charged up, is an expense of the operation, as truly as the cost of repairing broken machinery or any other expense that ordi-

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narily is paid by the employer. Who is to bear the charge? It is plain that, on grounds of natural justice, it is not unreasonable for the State, while relieving the employer from responsibility for damages measured by common-law standards and payable in cases where he or those for whose conduct he is answerable are found to be at fault, to require him to contribute a reasonable amount, and according to a reasonable and definite scale, by way of compensation for the loss of earning power incurred in the common enterprise, irrespective of the question of negligence, instead of leaving the entire loss to rest where it may chance to fall—that is, upon the injured employee or his dependents. Nor can it be deemed arbitrary and unreasonable, from the standpoint of the employee's interest, to supplant a system under which he assumed the entire risk of injury in ordinary cases, and in others had a right to recover an amount more or less speculative upon proving facts of negligence that often were difficult to prove, and substitute a system under which in all ordinary cases of accidental injury he is sure of a definite and easily ascertained compensation, not being obliged to assume the entire loss in any case but in all cases assuming any loss beyond the prescribed scale."

The legislature was not bound to draw fine distinctions as to the difference in the degree of hazard in different kinds or classes of industrial employment so as to include some and exclude others from the operation of the act. See *Louisville etc. R. Co. v. Melton*, 218 U. S. 36, 51. If the legislature has the power, as it is settled it has, to abolish the common law rules with respect to the relations between employers and employees engaged in industrial enterprise for profit in the more hazardous kinds of work, we believe it necessarily follows that it has the power to extend the new system to all industrial employment, and that such extension constitutes a reasonable and valid exercise of the police power.

Counsel for the appellee point out that by the provision

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of section 28 of the act the members of the industrial accident board shall serve without remuneration. But so long as reputable citizens are willing to give their services to the public upon that condition and perform the duties imposed upon them by the law we do not see that the validity of the statute or the proceedings had under it are in any way affected by the provision.

The exception to the order overruling the demurrer to the complaint is sustained, and the case is remanded to the circuit court with instructions to vacate that order and sustain the demurrer.

*G. A. Davis* and *W. T. Carden* for plaintiff.

*W. F. Frear* (*Frear, Prosser, Anderson & Marx* on the brief) for defendant.

THOMAS P. CUMMINS *v.* JOHN A. CUMMINS,  
TRUSTEE FOR LYDIA A. CUMMINS, AND  
LYDIA A. CUMMINS.

No. 1037

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.  
HON. C. W. ASHFORD, JUDGE.

ARGUED NOVEMBER 19, 1917.

DECIDED DECEMBER 11, 1917.

QUARLES AND COKE, JJ., AND CIRCUIT JUDGE HEEN IN  
PLACE OF ROBERTSON, C.J., DISQUALIFIED.

**FRAUD**—*false representation—procuring execution of conveyance.*

Where complainant executes a conveyance for the benefit of his wife, without reading the instrument, but relies upon her assurance that the same contained the terms of a prior oral agreement between them, when in fact the terms of the instrument were more favorable to the wife and correspondingly detrimental to the husband, equity will afford relief to the injured party.

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**SAME—negligence—failure to read instrument—effect.**

Where a person signs an instrument without reading it, when he can read, he cannot, in the absence of fraud, deceit or misrepresentation, avoid the effect of his signature, but the rule is otherwise where its execution is obtained by a misrepresentation of its contents.

**SAME—misrepresentation—effect of when relating only to portion of contract.**

A fraudulent misrepresentation, even though it relates only to a portion of a contract, furnishes a complete defense of an enforcement of the whole.

**HUSBAND AND WIFE—fraud—effect of when perpetrated by wife against husband.**

If a wife by fraud and imposition on her husband induces him voluntarily to transfer property to her for her benefit a court of equity will afford him relief and compel reconveyance.

## OPINION OF THE COURT BY COKE, J.

This suit involves the validity of a conveyance made by appellant Thomas P. Cummins to respondent John A. Cummins, trustee for Lydia A. Cummins, by which one-half of all moneys, funds or income of complainant is conveyed to respondent John A. Cummins for the support and maintenance of respondent Lydia A. Cummins and the minor children of herself and the said complainant. The bill of complaint recites that at the time of the execution of the conveyance the complainant and said Lydia A. Cummins were legally married and had several minor children dependent upon complainant for support and maintenance; that respondent Lydia A. Cummins had informed complainant that she desired to live separate and apart from him and to have the custody and care of said minor children; that prior to the execution of the conveyance an oral agreement was made between complainant and the respondent Lydia A. Cummins to the effect that complainant should execute to respondent John A. Cummins, as trustee for respondent Lydia A. Cummins, an instrument conveying one-half of all his moneys, funds, in-



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come and salary for the maintenance of said minor children, but as the several minor children became of age or self-supporting the amount to be received under the terms of said conveyance should be reduced proportionately, and upon all of the minor children reaching the age of majority or becoming self-supporting said conveyance should be canceled; that for the purpose of putting into writing this oral agreement the complainant and respondent Lydia A. Cummins proceeded to the office of a firm of attorneys where a written conveyance was handed to complainant for execution; that at that time the respondent Lydia A. Cummins represented to the complainant that the said conveyance so handed to complainant for execution was in accordance with their prior agreement and that said conveyance provided that the sums of money set over to the respondent John A. Cummins, trustee for the respondent Lydia A. Cummins, would be reduced proportionately as said minor children became of age or self-supporting and that finally the conveyance would be canceled and all payments cease thereunder when all the children were of age or self-supporting, but that as a matter of fact no such provisions were contained in the written conveyance. The complainant thereupon signed and executed the conveyance not knowing its contents but believing it to contain the terms of the oral agreement made between himself and wife. It is further averred that the respondent Lydia A. Cummins, prior to and at the time of the execution of the conveyance, knew that the same did not contain the provisions agreed upon between herself and the complainant, but that on the contrary she was well aware of the provisions contained in the written conveyance; that the respondent Lydia A. Cummins fraudulently induced complainant to execute the conveyance with the intent and purpose of defrauding complainant of his property. Upon the theory that the



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agreement was obtained by fraud the conveyance is sought to be canceled. The respondents demurred to the bill of complaint, setting up twelve different grounds of demurrer. After a hearing the judge gave judgment sustaining said demurrer and dismissing the bill of complaint and complainant comes to this court on appeal.

All of the grounds specified in the demurrer have been carefully considered, but for the purpose of this opinion it is unnecessary to comment at length upon any of the grounds of demurrer except paragraph 5 thereof, which specifies that "no sufficient facts or circumstances or valid excuses or reasons are alleged or set forth in said bill of complaint sufficient to excuse the said respondent Thomas P. Cummins for his failure or neglect to advise himself fully as to the contents and effect of said conveyance before he executed the same. This presents for our consideration the dominant question in the case, to wit: To what extent may a person rely upon the representations of another concerning the contents of an instrument which he is about to execute, and to what extent will he be excused for the lack of the exercise of diligence and care? The question is now before this court for the first time. What then is to be the policy of the law in this jurisdiction? Is it better to encourage negligence in the foolish or fraud in the deceitful? Either course has its obvious dangers, but judicial experience exemplifies that the former is the less objectionable and hampers less the administration of pure justice. The law is not designed to protect the vigilant alone, although it rather favors them, but is intended as a protection to even the foolishly credulous as against the machinations of the designedly wicked. While it may be claimed that the parties to this cause were to a certain extent dealing with adverse interests involved, yet from the pleadings there is no intimation that the transaction was other

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than a friendly one between them and the conveyance prompted by a desire on the part of the complainant Cummins to provide sustenance for his minor children so long as the same might be required by them, even though they, together with their mother, were to live separate and apart from him. The record shows that the complainant and his wife, having agreed upon the terms of the conveyance to be executed by the complainant, proceeded together to the offices of the attorneys who had in advance prepared the conveyance; that the wife knew the contents of the instrument submitted to complainant for his signature and the complainant did not know its contents; that upon being assured by his wife that the document was in accordance with their prior oral agreement he signed and executed the same without reading it.

“A person who by means of the confidential relations with another, by deceit and imposition obtains property of the other, will be compelled in a proper case by a court of equity to make restitution to the person injured; so if a wife by fraud and imposition on her husband induces him voluntarily to transfer property to her for her benefit a court of equity will afford him relief and compel reconveyance. There is nothing in the marriage relation that prohibits such relief. If it were not so there would be a wrong without a remedy.” 13 R. C. L. p. 1355.

There is a strong present day tendency by the courts as well as the text writers to require the utmost good faith by all the parties concerned in a transaction of this nature even though they be strangers to each other and even when no trust or confidential relations exist between them. The law recognizes in many circumstances the right of a man to rely upon the statements of another. There is indeed a strong inclination on the part of the courts to hold, without any qualification that a person

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guilty of fraudulent misrepresentation cannot escape the effects of his fault on the ground of the injured party's negligence.

"One of the largest classes of cases in which courts of equity are accustomed to grant relief is where there has been a misrepresentation or *suggestio falsi*." 10 R. C. L. p. 323.

"Where the party intentionally or by design misrepresents a material fact, or produces a false impression, in order to mislead another, or to entrap or cheat him, or to obtain an undue advantage of him; in every such case there is a positive fraud in the truest sense of the term." 1 Story, Eq. Jur., p. 189.

And a fraudulent misrepresentation, even though it relates only to a portion of a contract, furnishes a complete defense to an enforcement of the whole. See 2 Pomeroy, Eq. Jur., p. 387.

"It is well settled that a person who signs an instrument without reading it, when he has the opportunity to read it and can read, cannot avoid the effect of his signature merely because he was not informed of its contents. \* \* \* On the other hand, it is held that the instrument may be avoided where its execution is obtained by misrepresentation of its contents, so that the party signs a paper he did not know he was signing and did not really intend to sign, even though he had an opportunity to read the paper or to have it read to him and did not do so." 12 R. C. L. pp. 386, 387.

"It seems plausible at first sight to contend that a man who does not use obvious means of verifying the representations made to him does not deserve to be compensated for any loss he may incur by relying on them without enquiry. But the ground of this kind of redress is not the merit of the plaintiff, but the demerit of the defendant, and it is now settled law that one who chooses to make positive assertions without warrant, shall not excuse himself by saying that the other party need not have relied upon them. He must show that his representation was not in fact relied upon. \* \* \* In short,

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nothing will excuse a culpable misrepresentation short of proof that it was not relied on, either because the other party knew the truth, or because he relied wholly on his own investigation, or because the alleged fact did not influence his action at all." Pollock on Torts, 293, cited in *Griffin v. Roanoke R. & L. Co.*, 53 S. E. 307, 309.

"The doctrine is well settled that, as a rule, a party guilty of fraudulent conduct shall not be allowed to cry 'negligence,' as against his own deliberate fraud. Even where parties are dealing at arms' length, if one of them makes to the other a positive statement, upon which the other acts (with the knowledge of the party making such statement) in confidence of its truth, and such statement is known to be false by the party making it, such conduct is fraudulent, and from it the party guilty of fraud can take no benefit. While the law does require of all parties the exercise of reasonable prudence in the business of life, and does not permit one to rest indifferent in reliance upon the interested representations of an adverse party, still, as before suggested, there is a certain limitation to this rule, and, as between the original parties to the transaction, we consider that where it appears that one party has been guilty of an intentional and deliberate fraud, by which, to his knowledge, the other party has been misled, or influenced in his action, he cannot escape the legal consequences of his fraudulent conduct by saying that the fraud might have been discovered had the party whom he deceived exercised reasonable diligence and care." *Linington v. Strong*, 107 Ill. 295, 302; *Kilmer v. Smith*, 77 N. Y. 226.

If at the time of the execution of the conveyance referred to the respondent Lydia A. Cummins had remained noncommittal the complainant could expect no relief in equity although the terms of the document were not in accordance with his prior agreement with his wife, but the fact that she falsely assured him that the document which he was about to sign did contain such terms, and that relying upon this assurance respondent executed

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the conveyance, the case is brought clearly within the definition of fraud, and equity will afford relief.

"It is well settled that a person who signs an instrument without reading it, when he can read, cannot in the absence of fraud, deceit or misrepresentation, avoid the effect of his signature because not informed of its contents. \* \* \* But the rule is otherwise where its execution is obtained by misrepresentation of its contents; the party signing a paper he did not know he was signing, and did not really intend to sign. It is immaterial in the latter aspect of the case that the party signing had the opportunity to read the paper for he may have been prevented from so doing by the very fact that he trusted to the truth of the representation made by the other party with whom he was dealing." *Beck & Pauli Lith. Co. v. Hauppert*, 16 So. 522; *Burroughs v. Pacific Guano Co.*, 1 So. 212; *Cent. of Ga. Ry. Co. v. Goodwin*, 47 S. E. 641; *Wilcox v. American Telephone & Telegraph Co.*, 68 N. E. 153.

Judicial veneration for the rule which pronounces a written contract the highest and best evidence of an agreement between the parties cannot successfully protect such a contract when it is assailed upon the ground of fraud in its procurement. Upon obvious grounds of policy and necessity a written instrument executed by parties for the purpose of expressing and showing an agreement entered into between them is not to be avoided except by clear, strong and satisfactory evidence, but this relates to the subject of proof, not of pleading.

Counsel for respondents have urged the case of *Cummins v. Carter*, 17 Haw. 71, as an authority applicable to the case now under consideration, but in that case this court held that the deed sought to be annulled was read to the grantor from end to end and that "*no fraud or deception was practiced upon him.*" Likewise is the case of *Upton v. Tribilcock*, 91 U. S. 45, cited by respondents, clearly distinguishable from the case at bar.

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For the purpose of the consideration of the demurrer of the respondents herein the allegations in the bill of complaint are to be taken as confessed. Wherefore, and in view of the law as herein expressed, we are of the opinion that the bill of complaint sufficiently states a cause of action and that the demurrer of respondents should have been overruled.

The order sustaining respondents' demurrer and the judgment dismissing the action are hereby reversed and the cause is remanded to the circuit judge with instructions to overrule respondents' demurrer.

*W. B. Pittman* (*Andrews & Pittman* on the brief) for complainant.

*R. A. Vitousek* (*Thompson & Cathcart* on the brief) for respondents.

HENRY C. BROWN *v.* HENRY W. KINNEY, SUPER-  
INTENDENT OF PUBLIC INSTRUCTION OF  
THE TERRITORY OF HAWAII, ET AL.

No. 1042.

ERROR TO CIRCUIT JUDGE, FIFTH CIRCUIT.

HON. L. A. DICKEY, JUDGE.

ARGUED NOVEMBER 30 AND DECEMBER 3, 1917. DECIDED DECEMBER 17, 1917.

ROBERTSON, C.J., QUARLES AND COKE, JJ.

APPEAL AND ERROR—*mandamus*—*satisfaction of judgment*..

Under the statute relating to writs of error, the judgment in a mandamus case is not regarded as fully satisfied where a peremptory writ, though served, has not been complied with.

SAME—*same*—*plaintiff in error in contempt of court*.

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In this Territory the judgment of a circuit judge in a mandamus case may be reviewed by the supreme court either upon an appeal or a writ of error. The right of the respondent to a writ of error is not lost because of the fact that he may be in contempt of court for not having obeyed the mandate of a peremptory writ.

SCHOOLS—*status of teacher—contract.*

Where one who has been appointed a school teacher by the department of public instruction enters into a contract with the Territory to serve as such teacher for a specified time, the department is under no legal obligation to reappoint him at the expiration of the contract, or to assign a reason for not reappointing him, or to give him a hearing in connection with its decision not to reappoint him.

## OPINION OF THE COURT BY ROBERTSON, C.J.

This case has come before this court upon a writ of error issued to the circuit judge of the fifth circuit to review a decision and order granting a peremptory writ of mandamus directed to the department of public instruction of the Territory of Hawaii and the several commissioners of the department requiring it and them to forthwith reinstate the petitioner, Henry C. Brown, now the defendant in error, as principal of the public school at Waimea, county of Kauai.

The defendant in error filed a motion that the writ be dismissed on the ground that execution had been fully satisfied prior to the issuance of the writ. Upon the motion the contention was made that as the peremptory writ of mandamus had been served on the respondents the order of the circuit judge should be regarded as having been fully satisfied notwithstanding that the petitioner had not been in fact restored to his position as principal of the school. And the alternative contention was made that if the latter fact showed that the order of court had not been satisfied then the plaintiffs in error were in contempt of court and the writ of error should be dismissed

## Opinion of the Court.

on that account. The motion was overruled. The statute (R. L. 1915, Sec. 2518) provides that a writ of error may be had at any time before execution is fully satisfied within six months from the rendition of judgment, and that (Sec. 2525) in civil cases the writ issues as of right. It was not shown that the plaintiffs in error had been adjudged to be in contempt for failing to obey the mandate, or that any attempt had been made to have them so adjudged. Upon a showing that they had applied, or intended in good faith to apply, for a writ of error the circuit judge might have granted a stay, or without granting a stay, might have declined to consider them as being contumacious. The reinstatement of the petitioner would have, of course, fully satisfied the mandate and defeated the right to a writ of error. But we do not feel at liberty to read into the statute a provision to the effect that one who is possibly in contempt of court may not have a writ of error. The issuance of the writ operated as a stay from the time of notice thereof. R. L. 1915, Sec. 2533. At common law a writ of error lies to review a final judgment in a mandamus proceeding. 3 Bl. Com. 265; *Kenny v. Hudspeth*, 59 N. J. L. 504, 529. In *Hartman v. Greenhow*, 102 U. S. 672, 675, it was said, "The judgment (in mandamus), therefore, in the case, stands like the judgment in an ordinary action at law, subject to review under similar conditions." In this Territory such a judgment may be reviewed by this court either upon an appeal or a writ of error.

The material facts involved in the consideration of the case upon its merits are as follows: Mr. Brown, the petitioner, had been principal of the public school at Wai-mea, Kauai, for about five years, when he entered into a contract in the form used by the department of public instruction in the following terms,



## Opinion of the Court.

## "REGULAR CONTRACT.

"This Agreement, made this....day of June 1915, by and between the Territory of Hawaii, by H. W. Kinney, its Superintendent of Public Instruction, hereinafter called the party of the first part, and Henry C. Brown, hereinafter called the party of the second part:

"Witnesseth:

"The party of the first part hereby agrees to employ the party of the second part as a teacher in the public schools of the Territory of Hawaii for the school year ending the 31st day of August, 1916, at a yearly salary of \$1,800.00, payable in monthly installments as provided by the Rules and Regulations of the Department of Public Instruction, and in consideration therefor the said party of the second part hereby agrees to accept the terms of said employment and faithfully perform all the duties required of him/her by the Rules and Regulations of the Department of Public Instruction.

"And it is hereby stipulated and agreed by and between the said parties that the Rules and Regulations of the Department of Public Instruction of the Territory of Hawaii are hereby incorporated in and made a part of this contract and more particularly the chapter of said Rules and Regulations, which reads as follows:

"Dismissal and Transfer of Teachers.

"(1) A teacher may be dismissed from the service for cause, after a hearing of the case before the department or authorized agent of the department. The following may be considered as sufficient cause for dismissal:

- "(a) Immoral conduct.
- "(b) Insubordination.
- "(c) Inefficiency.
- "(d) Conviction of a penal offense.
- "(e) Incurable disease.

"A teacher may also be dismissed from the department whenever, after a hearing, it shall ap-

## Opinion of the Court.

pear to the department, that such dismissal will be for the benefit of the department.

“Dismissal for any of cause (a), (c), (d) will include cancellation of certificate.

“(2) A teacher may be transferred from one school to another at the discretion of the Department of Public Instruction.

“(3) Salaries may be withheld until reports, health certificates and inventories are received by the department.

“(4) A teacher may be reduced in salary for failure to carry out the provisions of the course of study, if his work is unsatisfactory, or for violation of the rules and regulations of the department.

“And it is further stipulated and agreed by and between the parties hereto that if the party of the second part without giving two weeks’ notice to the party of the first part voluntarily quits the employment of said party of the first part before the 31st day of August, 1916, said party of the second part shall forfeit all salaries then remaining unpaid and in addition thereto all claim to vacation salary to which he/she might otherwise be entitled.

“In Witness Whereof, the party of the first part has caused these presents to be executed by H. W. Kinney, its Superintendent of Public Instruction, and the party of the second part has hereunto set his/her hand and seal the day and year first above written.

“Territory of Hawaii,

“By Henry W. Kinney

“Superintendent of Public Instruction.

“Henry C. Brown.”

On or about April 4, 1916, a circular letter was sent to the teachers in public schools, including Mr. Brown, as follows:

“Honolulu, April 4, 1916.

“The Department of Public Instruction desires to have complete data for use at the meeting of the Board of Commissioners next month, when the assignment of teachers for the coming year will be made.

## Opinion of the Court.

"Will you, therefore, kindly indicate your wishes in that regard in the blank below and return it to this office by April 15th. Where a change is desired, state briefly your reason.

"You will understand that this is merely a request for information, which is being sent to all teachers in order that the Department may be able to pay attention to their wishes whenever it is found practicable and profitable to do so. Replies must be made promptly in order to receive attention

"Yours very respectfully,

"Henry W. Kinney

"Superintendent of Public Instruction."

Mr. Brown's reply thereto being as follows:

"Department of Public Instruction.

"Honolulu, T. H.

"Dear Sirs:

"Replying to your inquiry relative to my wishes as to a position in the public schools for the school year 1916-17, I beg to say that I wish:—

"reappointment to the same school. Waimea, Kauai.

~~"a transfer to .....~~

(Give name of school or location)

~~"to resign my position.~~

"Reason:— .....

"Yours very truly,

"(Signed) Henry C. Brown

"Waimea, Kauai school

"Dated Apr 7—1916.

"P. O. Address during vacation.

"Waimea, Kauai."

It may be noted in passing that while it may be said that the words in the blank form of reply "to resign my position" indicate that the teachers were regarded as having a position of some sort of permanency which they might resign from, it will be observed on the other hand that the form of reply included also a request for "reappointment to the same school," which would imply that

## Opinion of the Court.

the term of service would expire at the end of the school year.

At a regular meeting of the commissioners held in the month of May, 1916, it was decided not to reappoint Mr. Brown after the expiration of the contract; and this information was communicated to him by the commissioner appointed from the county of Kauai. In August, a hearing having been requested by Mr. Brown, it was accorded by the commissioners, the object of Mr. Brown apparently being to get the commissioners to reconsider their action. On August 19, however, the superintendent of public instruction, pursuant to the decision of the commissioners, notified Mr. Brown that he would not be considered as in the employ of the department on or after September 1, 1916, for the reason that he had not been appointed to any position under the department for the school year beginning on that date.

On January 8, 1917, the circuit judge, sitting at chambers, granted an alternative writ of mandamus in which it was set forth, *inter alia*, that the petitioner is now, and for more than five years next last past has been the principal of the public school known as the Waimea school, at Waimea, county of Kauai, under the laws, rules and regulations of the department of public instruction and is entitled to teach in said school; that there is a good, valid, subsisting and existing contract between said department and the petitioner for the petitioner's services as principal of said Waimea school, or in such other or different capacity as said department may direct in accordance with the law; that the applicant is now, and ever since he has been in the employ of said department has been, at all times, ready, able and willing to perform all and every service which said department, or its authorized agents may direct, and does now offer to do and perform any service which said department may direct; that at

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the beginning of the school term the respondents wilfully, deliberately, knowingly, wrongfully and unlawfully failed, refused and neglected, and do now so fail, refuse and neglect to allow the petitioner to teach as principal in said school, or in any other capacity in said school or in any other school in the Territory, but instead have appointed another principal for said Waimea school; and that the superintendent of public instruction had notified the petitioner that he is no longer considered as being in the employ of the department. A demurrer to the alternative writ having been overruled, the respondents filed their return thereto in which they admitted the employment of the petitioner as principal of the Waimea school; admitted their refusal to allow the petitioner to teach in any school of the Territory; but denied that such refusal was wrongful or unlawful; denied the existence of a subsisting contract between the department and the petitioner, and alleged that the contract which had existed between them had expired on August 31, 1916, and that since said date the petitioner has not been employed by the department in any capacity; and alleged that the reason the petitioner had not been reappointed or re-employed was for the "good" or "benefit" of the department, and that the petitioner had been so informed. A hearing was had, but no new facts of importance were developed, and the question presented to the circuit judge was, as it is here, as to the status of school teachers in general, and the petitioner in particular, and the rights of the parties under the laws of this Territory.

We will quote from the decision of the circuit judge on the demurrer in order to show the general view entertained by him of the status of school teachers which led him to his final conclusion in the case, and then point out wherein we disagree with him. The judge said,

## Opinion of the Court.

“Section 262 Revised Laws 1915, provides that the department may, from time to time, appoint and remove such officers, agents and servants, as may be necessary for carrying out the purposes of this chapter. Section 265 provides that the inspector general may, in the discretion of the department, have the power of appointment and dismissal of school teachers. These statutes, the only ones on the subject until 1915, gave the department full control, but section 258, Revised Laws of 1915, provides that the department may adopt rules and regulations not contrary to existing law \* \* \* for the carrying out of the general scheme of education and for the transaction of its business, which, when approved by the governor, and published, shall have the effect of law. As these rules and regulations are not made by the department alone, they cannot be repealed by the department alone, and are binding on it. They, as I construe them, quite change the status of a teacher. Regulation 17 (6) provides that the department shall give notice to teachers whose work has fallen below standard, that unless their work shows satisfactory improvement before the end of the year, their reappointment may not be recommended. Such notice shall be issued prior to the meeting of the commissioners, at which appointments are made, for the ensuing school year. This is a mischievous and deceitful regulation if it is to be interpreted to mean that only the teacher below standard is to have notice that he is to be superseded by a better one and that the teacher up to standard may be superseded without notice. Yet this is the interpretation that respondents' general argument calls for. I do not so interpret the regulation. I think that by necessary implication it gives the teacher up to standard a right to a reappointment.”

Section 262 of the Revised Laws provides that “The department may, from time to time, appoint and remove such officers, agents and servants as may be necessary for carrying out the purposes of this chapter, and regulate their duties, powers and responsibilities, when not otherwise provided by law.”

Section 258 provides that “The department may adopt

## Opinion of the Court.

rules and regulations not contrary to existing law, for the government of all teachers and pupils, and its officers, agents and servants, and for the carrying out of the general scheme of education and for the transaction of its business, which, when approved by the governor and published, shall have the force and effect of law."

Section 1 of Rule 1 provides that "The department shall appoint such teachers, principals and supervisors as may be deemed necessary and consistent with the laws, rules and regulations relating to public schools, such appointment, *if not made for a definite period*, to continue during the pleasure of the department. Regular contracts are issued to duly certificated teachers whose reports during the preceding year show an average of or above the passing mark of 80 per cent. Provisional contracts are issued to teachers who hold no recognized certificate, or whose records during the preceding year have averaged less than 80 per cent."

Rule 9 provides for the dismissal of teachers for cause in terms quoted in the contract *supra*. Section 6 of Rule 17 provides that

"The department shall give notice to teachers, whose work has fallen below standard, that unless their work shows satisfactory improvement before the end of the year their reappointment may not be recommended. Such notice shall be issued prior to the meeting of the commissioners at which appointments are made for the ensuing school year."

The rules are to be read in the light of the preexisting practice of the department of public instruction to engage teachers upon yearly contracts. The department undoubtedly has the power to obtain the services of a teacher upon an appointment for a definite and limited period of time. This is expressly recognized by section 1 of Rule 1. The period for which such services may be contracted for is within the discretion of the department acting for the Territory, and beyond the control of any court. It is clear, therefore, that the department had the authority

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to appoint Mr. Brown to teach for a year whether he had previously been employed or not, and entirely irrespective of how many such contracts had been made with him from year to year. The contract which is set forth above expressly states the agreement of the Territory "to employ the party of the second part as a teacher in the public schools of the Territory of Hawaii for the school year ending the 31st day of August, 1916." The decision of the department not to reappoint Mr. Brown upon the expiration of his last contract was not, at least not in a legal sense, a dismissal from the service—it was simply a decision that he should not be reemployed. No provision of the statute or rules requires that the department should assign any reason or cause for not reappointing a teacher. The provisions of Rule 9 relating to the dismissal of teachers for cause plainly refers to such dismissal within the period covered by a contract. Section 6 of Rule 17 does not relate to dismissals, nor by any reasonable construction can it be regarded as giving a teacher who is up to standard "a right to a reappointment." The rule is nothing more than a directory provision for a warning to be given to teachers whose work has not been up to the mark that unless they improve "their reappointment may not be recommended."

Attention has been directed to Act 114 of the Session Laws of 1915, entitled "An Act to Establish a Retirement Fund for Pensioning Retired Teachers of the Public Schools," etc., which, as its title implies, provides for the creation of a pension fund to be composed partly of the contributions of "One per cent. per annum of the respective salaries paid to inspectors, principals, teachers and special teachers regularly employed in the public schools," etc.; and that "The department of public instruction shall have power to retire from service any inspector, principal, teacher or special teacher who shall have served in such



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capacity or capacities in the schools of this Territory for an aggregate period of twenty-five years," etc. It is contended that those provisions show an understanding on the part of the legislature that school teachers in this Territory are not employed or reemployed upon short-term contracts, but have a much more permanent tenure. This is possibly, but not necessarily, so. Many school teachers, though employed merely from year to year, doubtless remain in the service many years. The department might take into the service teachers under contracts for longer terms than one year. But whether that be done or not the word "retire" in the second of the above quotations is applicable to the retirement, as distinguished from dismissal, of a teacher during the term of an existing contract, whether it be for a long or short term. It is by no means certain that the legislature construed the law with reference to the tenure of school teachers in the way counsel for the defendant in error contends it did. In any event, a legislative construction of a statute can properly be taken into consideration only when the language of the act is open to construction by reason of its uncertainty or ambiguity. Courts "are at liberty to disregard a legislative construction which, in their judgment, is not a correct exposition of the original act." 36 Cyc. 1143. In the case at bar we entertain no doubt as to the meaning of the rules of the department of public instruction. Counsel have referred to the contract as that of the department of public instruction, but, properly speaking, though teachers are appointed by the department, they are employed by the Territory. We hold that the contract of the defendant in error expired on August 31, 1916, and that the department was under no legal duty to reappoint him or to give him a hearing in connection with the decision not to reappoint him. In *Marion v. Board of Education*, 97 Cal. 606, 608, the court said, "Under its general

## Syllabus.

powers, the board of education is authorized to enter into contracts with teachers, and fix their compensation and term of employment. If the board should employ a teacher for one year, it would be absurd to say that it could not dispense with the services of such teacher at the end of the year."

We deem it unnecessary to discuss the point raised by the attorney general as to whether, even if the defendant in error held a valid subsisting contract of employment as alleged, his remedy would be an action for breach of contract, and that mandamus would not lie.

The judgment of the circuit judge is reversed and set aside, and the cause remanded with instructions to discharge the writ.

*I. M. Stainback*, Attorney General, for plaintiffs in error.

*Fred Patterson* for defendant in error.

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IN THE MATTER OF THE INVESTIGATION OF  
THE INTER-ISLAND STEAM NAVIGATION  
COMPANY, LIMITED.

No. 1050.

APPEAL FROM PUBLIC UTILITIES COMMISSION.

ARGUED NOVEMBER 22, 1917.

DECIDED DECEMBER 18, 1917.

ROBERTSON, C.J., QUARLES, J., AND CIRCUIT JUDGE KEMP  
IN PLACE OF COKE, J., DISQUALIFIED.

COMMERCE—*statutes—common carriers.*

By the provisions of the Act of Congress of September 7, 1916, known as the Shipping Act, one engaged in transporting persons and property on the high seas on regular routes from port to

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port in the Territory of Hawaii is a common carrier by water in interstate commerce.

~~SAME—same—same—jurisdiction.~~

The shipping board established by the Act of Congress of September 7, 1916, has sole and exclusive jurisdiction to regulate the rates and charges of a common carrier by water in interstate commerce.

~~SAME—same—same—same—public utilities.~~

The public utilities commission has no jurisdiction to regulate the rates and charges of a common carrier by water in interstate commerce for the transportation of persons and property from port to port in the Territory of Hawaii.

## OPINION OF THE COURT BY QUARLES, J.

This is an appeal from an order made September 28, 1917, by the public utilities commission for the regulation of the shipping business of the appellant, the Inter-Island Steam Navigation Company, Limited. The order, excluding the title and preamble, is in words and figures as follows, to wit:

“That the Inter-Island Steam Navigation Company, Limited, reduce all charges for the carriage of passengers and freight to not to exceed the rates and classifications which were in effect on the 1st day of August, A. D. 1916;

“That the company so amend its freight tariff that the total charge for less than quantity lots shall not exceed the minimum charge for quantity lots;

“That said Inter-Island Steam Navigation Company, Limited, put into effect such changes in rates and classifications on or before the Fifteenth (15th) day of October, A. D. 1917.”

The hearing before the commission, which culminated in the order appealed from, commenced on August 24, 1916, and ended on September 4, 1917, when hearings before the commission ended and the matters investigated were taken under advisement. The findings of the commission were filed September 28, 1917. The

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minutes of the meetings of the commission, including the stenographic record of all testimony heard, cover two thousand one hundred and twenty-eight typewritten pages, and the documentary evidence introduced, the original exhibits of which are before us, are quite bulky. From the said order the Inter-Island Steam Navigation Company, Limited, hereinafter called the appellant, has appealed to this court, and in its appeal and notice of appeal, which covers four typewritten pages, states the grounds of appeal, which we summarize as follows:

(1) That the public utilities commission has no jurisdiction over the matter of the reasonableness of rates charged by appellant or over the appellant, sole and exclusive jurisdiction over said matters being vested in the shipping board created by Act of Congress dated September 7, 1916.

(2) That the order appealed from was made without jurisdiction and is violative of the provisions of the Fourth Article and of the Fifth and Fourteenth Amendments of the Federal Constitution in that no notice was given to appellant of a hearing upon the question of fixing or regulating rates or the classification of shipments.

(3) That the order is without jurisdiction in that the notice of hearing given the appellant was for a general investigation under the provisions of section 2225 R. L., under which the power to make regulations or institute suits might be exercised by the provisions of section 2233 R. L., but under which the powers given by the provisions of section 2234 R. L. cannot be exercised without violating the said provisions of the Constitution.

(4) That the finding of the commission is not sustained by the facts found in that the evidence and findings show that the rates and charges of appellant are not

## Opinion of the Court.

unjust or unreasonable but are too low and therefore insufficient.

The assignments of error set forth in the brief cover the points stated in the notice of appeal.

The first question is the serious one, and, if answered in the affirmative on the ground of lack of jurisdiction in the commission to make the order appealed from, will necessarily result in a reversal, in which event the other questions raised become immaterial. This question must be solved by a consideration, interpretation, and, where necessary, construction of those statutory provisions, both local and federal, which have a bearing upon this important question. The solution is not without difficulty.

The territorial legislature, by act which took effect July 1, 1913 (S. L. 1913, c. 89; R. L. 1915, c. 128, secs. 2221-2240 inclusive), hereinafter called the Public Utilities Act, created the public utilities commission, defined its powers and prescribed its duties. The Act gave the commission "general supervision over all public utilities doing business in the Territory of Hawaii." The sections of that Act which are necessary to be considered here are as follows:

Section 5 (Sec. 2225 R. L.): "The commission and each commissioner shall have power to examine into the condition of each public utility doing business in the Territory, the manner in which it is operated with reference to the safety or accommodation of the public, the safety, working hours and wages of its employees, the fares and rates charged by it, the value of its physical property, the issuance by it of stocks and bonds, and the disposition of the proceeds thereof, the amount and disposition of its income, and all its financial transactions, its business relations with other persons, companies or corporations, its compliance with all applicable territorial and federal laws and with the provisions of its franchise, charter and articles of association, if any, its classifications, rules,

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regulations, practices and service, and all matters of every nature affecting the relations and transactions between it and the public or persons or corporations. Any such investigation may be made by the commission on its own motion, and shall be made when requested by the public utility to be investigated, or upon a sworn written complaint to the commission, setting forth any *prima facie* cause of complaint. All hearings conducted by the commission shall be open to the public. A majority of the Commission shall constitute a quorum."

Section 13 (Sec. 2233 R. L.): "If the commission shall be of the opinion that any public utility is violating or neglecting to comply with any territorial or federal law, or any provision of its franchise, charter, or articles of association, if any, or that changes, additions, extensions or repairs are desirable in its plant or service in order to meet the reasonable convenience or necessity of the public, or to insure greater safety or security, or that any rates, fares, classifications, charges or rules are unreasonable or unreasonably discriminatory, or that in any way it is doing what it ought not to do, or not doing what it ought to do, it shall in writing inform the public utility of its conclusions and recommendations, shall include the same in its annual report, and may also publish the same in such manner as it may deem wise. The commission shall have power to examine into any of the matters referred to in section 2225, notwithstanding that the same may be within the jurisdiction of the interstate commerce commission, or within the jurisdiction of any court or other body, and when after such examination the commission shall be of the opinion that the circumstances warrant, it shall be its duty to effect the necessary relief or remedy by the institution and prosecution of appropriate proceedings or otherwise before said interstate commerce commission, or said court or other body, in its own name or in the name of the Territory, or in the name or names of any complainant or complainants, as it may deem best."

Section 14. (Sec. 2234 R. L.): "All rates, fares, charges, classifications, rules and practices made, charged, or observed by any public utility, or by two or more public utilities, jointly, shall be just and reasonable, and

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the commission shall have power, after a hearing upon its own motion, or upon complaint, and in so far as it is not prevented by the constitution or laws of the United States, by order to regulate, fix and change all such rates, fares, charges, classifications, rules and practices, so that the same shall be just and reasonable, and to prohibit rebates and unreasonable discriminations between localities, or between users or consumers under substantially similar conditions. From every order made by the commission under the provisions of this section an appeal shall lie to the supreme court of Hawaii in like manner as an appeal lies from an order or decision of a circuit judge at chambers. Such appeal shall not of itself stay the operation of the order appealed from, but the supreme court may stay the same, after a hearing upon a motion therefor, upon such conditions as it may deem proper as to giving a bond and keeping the necessary accounts or otherwise in order to secure a restitution of the excess charges, if any, made during the pendency of the appeal in case the order appealed from should be sustained in whole or in part."

Section 18 (Sec. 2238 R. L.): "The term 'public utility' as used in this chapter shall mean and include every person, company or corporation, who or which may own, control, operate, or manage as owner, lessee, trustee, receiver, or otherwise, whether under a franchise, charter, license, articles of association, or otherwise, any plant or equipment, or any part thereof, directly or indirectly for public use, for the transportation of passengers or freight, of the conveyance or transmission of telephone or telegraph messages, or the furnishing of facilities for the transmission of intelligence by electricity by land or water or air between points within this Territory, or for the production, conveyance, transmission, delivery or furnishing of light, power, heat, cold, water, gas or oil, or for the storage or warehousing of goods."

Section 20 (Sec. 2240 R. L.): "This chapter shall not apply to commerce with foreign nations, or commerce with the several states of the United States, except in so far as the same may be permitted under the constitution and

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laws of the United States; nor shall it apply to public utilities owned or operated by the Territory, or any county or city and county, or other political division thereof."

At the same session the territorial legislature passed an act entitled "An Act Relating to Certain Gas, Electric Light and Power, Telephone, Railroad and Street Railway Companies and Franchises in the Territory of Hawaii and Amending the Laws Relating Thereto" (S. L. 1913, c. 135). This Act related to several local corporations which had theretofore been granted franchises with the approval of Congress, the names of each and the approving Acts of Congress being as follows: The Hawaiian Electric Company (33 Stat. L. c. 1405, p. 227); Honolulu Gas Company (33 Stat. L. c. 1406, p. 231); Standard Telephone Company (34 Stat. L. c. 3441, p. 309); Wailuku Electric Company (35 Stat. L. c. 80, p. 606); Lahaina Ice Company (35 Stat. L. c. 80, p. 608); Kona Railway Company (36 Stat. L. c. 419, p. 843); and the Hilo Street Railway Company (37 Stat. L. c. 270, p. 243), and made them subject to the provisions of the Public Utilities Act. This Act was approved and amended by Congress (39 Stat. L. c. 53, p. 38), the amendment consisting in interpolating therein the following: "and all franchises heretofore granted to any other public utility or public-utility company, and all public utilities and public-utilities companies organized or operating within the Territory of Hawaii," and by adding two provisos as follows: "*Provided, however,* That nothing herein contained shall in any wise limit the jurisdiction or powers of the Interstate Commerce Commission under the Acts of Congress to regulate commerce; And provided further, That all acts of the public-utility commission herein provided for shall be subject to review by the courts of the said Territory." On September 7, 1916, at the same session, Congress passed what is known as the Shipping Act (39 Stat. L. c. 451, p. 728), by



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the first section of which the term "common carrier by water in interstate commerce" is defined as "a common carrier engaged in the transportation by water of passengers or property on the high seas or the Great Lakes on regular routes from port to port between one State, Territory, District or possession of the United States and any other State, Territory, District, or possession of the United States, or between places in the same Territory, District or possession." Sections 18 and 19 of said Act are as follows:

"That every common carrier by water in interstate commerce shall establish, observe, and enforce just and reasonable rates, fares, charges, classifications, and tariffs, and just and reasonable regulations and practices relating thereto and to the issuance, form, and substance of tickets, receipts, and bills of lading, the manner and method of presenting, marking, packing, and delivering property for transportation, the carrying of personal, sample, and excess baggage, the facilities for transportation, and all other matters relating to or connected with the receiving, handling, transporting, storing, or delivering of property.

"Every such carrier shall file with the board and keep open to public inspection, in the form and manner and within the time prescribed by the board, the maximum rates, fares, and charges for or in connection with transportation between points on its own route; and if a through route has been established, the maximum rates, fares, and charges for or in connection with transportation between points on its own route and points on the route of any other carrier by water.

"No such carrier shall demand, charge, or collect a greater compensation for such transportation than the rates, fares, and charges filed in compliance with this section, except with the approval of the board and after ten days' public notice in the form and manner prescribed by the board, stating the increase proposed to be made; but the board for good cause shown may waive such notice.

"Whenever the board finds that any rate, fare, charge,

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classification, tariff, regulation or practice, demanded, charged, collected or observed by such carrier is unjust or unreasonable, it may determine, prescribe, and order enforced a just and reasonable maximum rate, fare, or charge, or a just and reasonable classification, tariff, regulation, or practice." (Sec. 18.)

"That whenever a common carrier by water in interstate commerce reduces its rates on the carriage of any species of freight to or from competitive points below a fair and remunerative basis with the intent of driving out or otherwise injuring a competitive carrier by water, it shall not increase such rates unless after hearing the board finds that such proposed increase rests upon changed conditions other than the elimination of said competition." (Sec. 19.)

There is no question that the appellant, under the provisions of the Shipping Act, is a "common carrier by water in interstate commerce." It is engaged in the transportation by water of passengers and property on the high seas on regular routes from port to port in the Territory of Hawaii. The Shipping Act is a comprehensive one and by its provisions Congress certainly intended to control, through the shipping board by it created, all shipping by water on the high seas in both foreign and interstate commerce and did not intend that any part of such commerce should be controlled by any other commission or board. The reasons for and the objects and purposes of the Shipping Act are obvious, proper, and, we think, necessary owing to the state of war existing between the United States and certain European powers. If Congress, by amending and approving Act 135 aforesaid, placed control of the matter of regulating the rates and charges of appellant in its interstate commerce in the public utilities commission, of which we have grave doubts, by enacting the Shipping Act it withdrew such control from the commission and placed it in the ship-

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ping board, which, since the approval of the Shipping Act, has sole jurisdiction to regulate such rates and charges. Congress has the exclusive power of controlling and regulating foreign and interstate commerce and plenary legislative power in the Territories. It has the power to place all shipping on the high seas in the Territory on the same plane as interstate commerce, to declare the same interstate commerce and to withdraw the control thereof from any local board or commission and place the same in a board created by it, and we are satisfied that it has done so in the Shipping Act. The view might be taken that under the rule *noscitur a sociis* the amendments made to Act 135 of 1913 by Congress only relate to utilities companies which have been granted franchises by or with the approval of Congress, the Act, as it passed the legislature of Hawaii and as introduced into Congress, relating only to corporations or companies or individuals that had been granted franchises with the approval of Congress, and the appellant not having been granted any franchise, either by the territorial legislature or by Congress, is not included in the act as amended and passed by Congress, but it is not, in our view of this case, necessary to decide the point. And it is not necessary to consider, discuss or decide whether the Shipping Act repeals by implication any portion of the said act of Congress of March 28, 1916, approving and amending Act 135 of the 1913 session of the local legislature. This act, by its terms, was not to take effect until approved by Congress. If the action of Congress in amending that Act, as it did, has the effect of granting permission to the public utilities commission to regulate the interstate commerce carried on by the appellant on the high seas, that permission has been withdrawn by the Shipping Act. The provisions of the Public Utilities Act, as amended by Congress, may well be held to be suspended or superseded by

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the Shipping Act on the principle that the last expression of the will of Congress prevails when it conflicts with former provisions (*Henrietta M. & M. Co. v. Gardner*, 173 U. S. 123, 128). It is contended by counsel for the public utilities commission that the commission has not been deprived of jurisdiction to fix the minimum rates for freight or passage of the appellant and that the shipping board has only been given power to fix maximum rates for such freight or passage, and therefore concurrent jurisdiction exists in the shipping board and public utilities commission to a certain extent. This contention cannot be sustained as under the Shipping Act the commission has no power to regulate such rates and charges at all. If, however, this contention should prevail much confusion and more or less conflict would result. Suppose, for instance, the shipping board should establish a maximum freight charge of one dollar and fifty cents per ton for freight of a certain class between the ports on the island of Oahu and ports on the island of Maui, and the public utilities commission should establish a minimum rate of the sum of two dollars per ton, here would be a direct conflict of jurisdiction. Which would control? There is and can be no dual control of interstate commerce by the federal and local governments. As "there is no room in our scheme of government for the assertion of state power in hostility to the authorized exercise of federal power," as held in the *Minnesota Rate Cases*, 230 U. S. 352, 399, the reason is equally cogent for holding that there is no room for the exercise of the power of the Territory in hostility to that of the federal government in the matter of regulating the business of a common carrier by water between different ports of this Territory. We think the conclusion is irresistible that Congress, having acted, and having placed the regulation of such commerce in the shipping board, the public

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utilities commission is excluded from exercising such regulation (*Southern Ry. Co. v. R. R. Comm.*, 236 U. S. 439; *Texas & Pac. Ry. Co. v. Rigsby*, 241 U. S. 33; *Chicago, R. I. etc., Ry. Co. v. Hardwick Elevator Co.*, 226 U. S. 426, 435; *N. Y. Cent. & H. R. R. Co. v. Hudson County*, 227 U. S. 248, 264; *St. Louis I. M. & S. Ry. Co. v. Edwards*, 227 U. S. 265, 268).

If it should be held that Congress granted power to the public utilities commission to regulate the rates and fares charged by the appellant in its shipping business by the amendments to Act 135 aforesaid, as to which we have already expressed a doubt, it was not an irrevocable grant and was subject to recall at any time by Congress. In speaking of exertions of power to regulate commerce the Supreme Court in *Louisville Bridge Co. v. United States*, 242 U. S. 409, at page 419, said: "Such a regulation, designed as it is to furnish a guiding rule for future conduct, carries with it the suggestion that it may not always remain unchanged. And since our interstate and foreign commerce is a thing that grows with the growth of the people, and its instrumentalities change with the development and progress of the country, it was not natural that Congress, in enacting the regulation of such commerce, should intend to put shackles upon its own power in respect of future regulation." The legislature of Hawaii, in section 13 of the Public Utilities Act (Sec. 2233 R. L.), heretofore quoted, virtually recognizes the power of Congress to place the regulation of the business of a public utility in some commission, board or court, other than the public utilities commission, thereby taking such regulation out of the control of the commission.

The sole function of the order appealed from being to regulate the fares and rates charged by the appellant in interstate commerce, jurisdiction to make the same rest-

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ing solely and exclusively in the shipping board, the order was made without jurisdiction and the other questions raised by the appeal and assignments of error become immaterial and a discussion of them is useless and unnecessary.

The order appealed from is reversed.

*E. M. Watson, C. F. Clemens and W. T. Carden* for the Public Utilities Commission.

*D. L. Withington (Castle & Withington, Smith, Warren & Whitney, and R. W. Breckons* on the brief), and *Frear, Prosser, Anderson & Marx* for the I. I. S. N. Co.

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IN THE MATTER OF THE ESTATE OF DAVID P.  
KAIENA, DECEASED.

No. 1033.

RESERVED QUESTIONS FROM CIRCUIT JUDGE, FIRST CIRCUIT.  
HON. C. W. ASHFORD, JUDGE.

SUBMITTED DECEMBER 7, 1917.

DECIDED DECEMBER 20, 1917.

ROBERTSON, C.J., QUARLES AND COKE, JJ.

COURTS—*circuit judge at chambers—probate jurisdiction.*

The provision of section 2272, R. L. 1915, giving circuit judges at chambers jurisdiction "to determine the heirs at law of deceased persons and to decree the distribution of intestate estates" does not extend to cases where the decedent left a will though there be a partial intestacy.

EXECUTORS AND ADMINISTRATORS—*title to real estate.*

Title to real estate vests at once on the death of the owner in his heirs or devisees, and without an order of court. An executor takes no title to the real estate of his testator nor power over the same except under special circumstances for a certain limited purpose.

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## OPINION OF THE COURT BY ROBERTSON, C.J.

It appears by the record in this case that the will of one David P. Kaiena, deceased, having theretofore been duly admitted to probate by a circuit judge of the first circuit court, sitting in probate, the executrix of the will filed a petition for the approval of her account and for the disposition of the estate which consists entirely of land, there being no money or other personalty to be distributed. The circuit judge, being in doubt, reserved for the consideration of this court three questions, as follows:

“a. Has the circuit court, or a judge thereof, sitting at chambers, in probate, in a case such as above described, jurisdiction and authority—and is it good and correct practice for such court, under such circumstances—to make and enter a decree of distribution describing and embracing the real estate devised in and by the will which is under consideration?

“b. Do the devisees of real estate named in a will, duly probated in our courts and under our practice, take title in and to the real estate thereby devised, merely by virtue of such will, and of its admission to probate,—or, do they take title by virtue of a decree of distribution of such real estate to be made by said circuit court or judge sitting in probate?

“c. If it be competent, and good and correct practice for the circuit court or judge, under such circumstances, to so distribute, by its decree, the real estate devised in and by such will,—then to whom should said real estate be distributed, and in what estates and proportions? And more particularly, do the devisees named in said will, namely, Mrs. Henrietta Kahaulikanahale Bishaw, Mary Annie Kealakaa and Henry Luuloo, take an estate in fee, or an estate for life, or some other and different estate, and, if so, what estate, in the lands so devised? And, if said devisees, Mrs. Henrietta Kahaulikanahale Bishaw, Mary Annie Kealakaa and Henry Luuloo, take an estate

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less than an estate in fee simple, to whom, and in what proportions and estates should the remainder be distributed?"

Under section 2272 of the Revised Laws circuit judges at chambers have jurisdiction, among other things, "to determine the heirs at law of deceased persons and to decree the distribution of intestate estates." As pointed out in *Mossman v. Hawaiian Government*, 10 Haw. 421, 432, in order to give the probate court jurisdiction under that provision the proceeding must be one instituted, upon proper notice, directly for the purpose of determining heirs and distributing an intestate estate. The proceeding in the case at bar is described in the record as one "for the approval of the account of said executrix, and for the disposition of said estate, or other appropriate order and decree in the premises," and we doubt whether it could be regarded as a direct proceeding to determine heirship to real estate. What notice, if any, was given of the proceeding does not appear.

The will which was crudely drawn in the Hawaiian language may not clearly disclose the testator's intent. The only counsel who have appeared in this court take the view that only life estates in the land were disposed of by the will, and that there is an intestacy as to the remainder. We are of the opinion that the jurisdiction of circuit judges to "decree the distribution of intestate estates" extends only to cases where the decedent left no valid will, and does not include cases where there is a will but a partial intestacy. A court of equity has no jurisdiction to construe a will where the claims of the parties are of a strictly legal character and no trust is involved. *Paiko v. Boeynaems*, 21 Haw. 196. Nor, in the absence of statute, have probate courts such jurisdiction except to such incidental extent as may be necessary in the exercise of their general jurisdiction over the



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ordinary administration of estates. 40 Cyc. 1842. See *Nakookoo v. Noholoa*, 19 Haw. 667. To determine the heirs and decree the ownership of land as intestate property where the decedent left a will would generally, as it would in this case, require the construction of the will in all its parts. We think the legislature has not manifested an intention to confer such jurisdiction on circuit judges sitting in probate. Prior to the original enactment of the statute in question it had been the practice of the probate courts to decree the ownership of land and its division among the heirs in settling the administration of intestate estates. But in the case of *Kailianu v. Lumai*, 8 Haw. 508, that was held to be "a usurpation of jurisdiction" as "neither by statute nor by precedents does such an authority exist." Probably the statute was passed in order to legalize the prevailing practice, but its language does not require a holding that it applies to cases of mere partial intestacy.

Title to land is acquired either by descent or purchase. Title transferred by will falls within the latter category. The devisee takes title from and through the will, upon its being proved and admitted to probate, subject only to the widow's dower, if there be a widow not otherwise provided for, and the claims of legatees and creditors, if any there be, and the sale of real estate is authorized for the payment of such. See 40 Cyc. 1995. No decree of court is necessary or appropriate to vest the title to real estate in the devisee. "Real estate, at the common law, becomes vested at once on the death of the owner in his heirs, or devisees, and the executor or administrator has as such no inherent power over it." 2 Schouler on Wills (5th ed.), Sec. 1212. See also *Magoon v. Pioneer Mill Co.*, 17 Haw. 159, 161, where the court said, "an executor is not in law entitled to possession of land," and *Trustees, etc., v. Ena*, 18 Haw. 588, 590, where it was

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said that "the executors have no jurisdiction over the real estate whether mortgaged or not in the absence of a petition to the probate court under R. L. (1905) Sec. 1855, reciting that the personal estate is insufficient for the purpose of paying debts. Woerner, Administration, Sec. 338."

We therefore reply to the first question in the negative. Our reply to the second question is that the devisees take title to the real estate directly by and from the will and not by virtue of a decree of distribution. The third question requires no answer.

*Mott-Smith & Lindsay* for Henrietta K. Bishaw.

SUNG SO LIM *v.* T. MIYAUCHI AND T. MARUMOTO.

No. 1035.

APPEAL FROM CIRCUIT JUDGE, THIRD CIRCUIT.

HON. J. W. THOMPSON, JUDGE.

SUBMITTED DECEMBER 7, 1917.

DECIDED DECEMBER 26, 1917.

ROBERTSON, C.J., QUARLES AND COKE, JJ.

**FRAUD—conveyance—intent of parties.**

The test of a fraudulent conveyance for a valuable consideration is the mutual intent of the parties. Fraudulent intent on the part of one is not sufficient without a corresponding intent on the part of the other.

**SAME—same—same.**

The rule is settled that a conveyance by a debtor to one of his creditors in payment of his claim is not invalidated by the fact that it was made with an intent on the part of the vendor to defraud other creditors, where such intent is not known to, or participated in, by the purchaser.

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*SAME—same—presumption of law where vendee is in possession of property.*

The law presumes the possession of the vendee to have been lawfully acquired, and where it appears that a sufficient consideration was paid the transfer will be upheld unless it be affirmatively shown that he purchased in bad faith.

## . OPINION OF THE COURT BY COKE, J.

The complainant, appellant, brought a suit in equity to cancel and set aside a bill of sale and an assignment of lease from respondent T. Miyauchi to respondent T. Marumoto, also a lease from one J. G. Henriques to respondent Marumoto, averring that complainant was, at the time of these transfers, a creditor in a large amount of the respondent Miyauchi and that the said several transfers were fraudulent and made with the intent and purpose of preventing complainant from collecting the indebtedness due him from respondent Miyauchi. At the conclusion of the trial the circuit judge rendered a decision dismissing the bill of complaint and a decree to that effect was thereafter entered. The complainant appeals to this court. The appellant relies on three specifications of error claimed to have been committed by the circuit judge, to wit, (1) that the evidence discloses that a secret partnership existed between Miyauchi and Marumoto and that therefore the conveyance of Miyauchi to Marumoto is void as against complainant; (2) that the instruments sought to be set aside were without consideration and void as against complainant; and (3) that the transactions between Miyauchi and Marumoto relating to the bill of sale, the assignment of lease and the new lease to Marumoto are tainted with fraud.

There was unusual harmony in the evidence introduced at the trial. Briefly stated this evidence shows that in the year 1908 respondent Miyauchi was indebted to the

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complainant herein in the sum of \$908 for which Miyauchi executed his promissory note; that in September, 1915, the complainant brought suit against Miyauchi for the recovery of the amount due, and in November, 1916, judgment was recovered by complainant in the circuit court of the third circuit. It further appears that in the year 1909 the respondent Miyauchi and one Umeda were co-partners conducting a draying and hauling business in the district of South Kona, Island of Hawaii, and that the firm was the owner of a number of horses, wagons and other chattels used in and about the business in which it was engaged. The firm was indebted to various parties, the largest creditor being H. Hackfeld & Co., to whom the sum of \$3500 was owing. Umeda, desiring to leave for Japan, sold his interest in the firm to Miyauchi for the sum of \$2000 and in order to pay Umeda and to liquidate the outstanding indebtedness of the firm Miyauchi, in 1909, borrowed the sum of \$6700 from Marumoto and executed to him a mortgage covering the property formerly owned by the copartnership firm as security. In 1911, the amount of the indebtedness having been reduced by sundry payments to the sum of \$4900, the old mortgage was canceled and a new mortgage, with the same security, was given by Miyauchi to Marumoto. In January, 1915, the amount remaining due to Marumoto from Miyauchi was \$3885.75. The value of the property had greatly depreciated, and Miyauchi having become discouraged over the outlook of the enterprise, it was agreed that he should transfer to Marumoto all the property he then possessed, which was of the value of about \$2500, and which was to be accepted by Marumoto in full settlement of Miyauchi's indebtedness to him, amounting at that time to \$3885.75. For this purpose the transfers which the complainant now seeks to invalidate were made.

The evidence shows that Marumoto acquired the prop-

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erty of Miyauchi in January, 1915, and that the conveyances were recorded in the office of the registrar of conveyances on the 30th day of January, 1915, and that not until a long time subsequent to that date did Marumoto become aware of the existence of the indebtedness of Miyauchi to complainant. The record in this cause affirmatively discloses not merely a sufficient, but an abundant consideration for the transfer from Miyauchi to Marumoto. On the other hand, the evidence fails to establish the existence at any time of a copartnership between Miyauchi and Marumoto. Their relation seems to have been solely that of debtor and creditor. The evidence further fails to disclose any act of fraud on the part of Marumoto. Whatever may have been Miyauchi's motives for withholding from Marumoto information respecting his indebtedness to the complainant at the time the bill of sale was executed in January, 1915, certainly the evidence fails to connect Marumoto with any fraudulent purpose in connection with the transaction. Even after acquiring the property of Miyauchi still Marumoto would sustain almost if not quite as large a loss as the amount of the complainant's judgment.

The test of a fraudulent conveyance in the case of a transfer of this nature made for a valuable consideration is the mutual fraudulent intent of the parties. Fraudulent intent on the part of one is not sufficient without a corresponding intent on the part of the other. See 12 R. C. L. p. 531. The rule is well settled that a conveyance by a debtor to one of his creditors in payment of his claim is not invalidated by the fact that it was made with an intent on the part of the vendor to defraud other creditors where such intent is not known to, or participated in by, the purchaser. We can find nothing in the record in this case from which it could be fairly inferred that the respondent Marumoto was actuated other than by honest

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motives in his dealings with Miyauchi. The law presumes the possession of the vendee to have been lawfully acquired and where it appears that a sufficient consideration was paid the transfer will be upheld unless it be affirmatively shown that he purchased in bad faith. Bad faith on the part of Marumoto has not been shown.

The judgment and decree herein by the circuit judge dismissing the bill of complaint are affirmed.

*A. G. Correa* and *Lightfoot & Lightfoot* for complainant.  
*J. W. Russell* for T. Marumoto.

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MUTUAL TELEPHONE COMPANY, A CORPORATION,  
 v. NIPPU JIJI COMPANY, LIMITED,  
 A CORPORATION.

No. 1047.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.  
 HON. C. W. ASHFORD, JUDGE.

ARGUED DECEMBER 20, 1917.

DECIDED DECEMBER 29, 1917.

ROBERTSON, C.J., QUARLES AND COKE, JJ.

**EQUITY—dismissal of bill—practice.**

It is not correct practice to dismiss a bill in equity for want of equity in the bill, on motion of the respondent after answer filed unless the respondent admits the truth of all the facts averred in the bill and submits the case without leave to offer evidence in the event that his motion shall be denied.

**TELEGRAPHS AND TELEPHONES—right of telephone company to equitable relief against interference with its business.**

A bill for an injunction filed by a public telephone company which shows, in substance, that the company, in performance of its duty to give good and efficient service, furnishes to its sub-

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scribers, for their convenience and information, a directory giving the names and numbers of all its subscribers, and a special directory in the Japanese language for the use of subscribers of Japanese nationality; that the company has endeavored to properly fulfil its duty in the premises, but that such duty cannot be effectively performed unless it has control of the publication and distribution of such directories to the end that their accuracy may be verified; that the respondent has published and is circulating a directory in the Japanese language which is inaccurate and incomplete and contains the names of persons who are not subscribers to the complainant's telephone system, and which causes much trouble and annoyance to the company and its subscribers; and that in publishing the names of non-subscribers who may be reached by calling up certain telephone numbers the respondent causes an increase in the volume of the company's operations and at the same time deprives the company of a certain amount of revenue which it is entitled to receive, states a case entitling the complainant to relief in equity.

## OPINION OF THE COURT BY ROBERTSON, C.J.

The complainant exhibited its bill in equity in the court below averring, in substance, that it is a corporation duly organized and chartered under the laws of this Territory for the purpose of establishing and maintaining a telephone system in the city and county of Honolulu, and is now, and for many years past has been operating such telephone system; that, as a necessary part of the service required to be furnished by it, the complainant has, from time to time, and particularly on or about the first day of April, 1917, caused to be issued and furnished to its subscribers a directory containing the names of all of its subscribers, their addresses and telephone numbers, together with a properly classified list of the subscribers for business telephones; that each subscriber is required to enter into a contract with complainant wherein and whereby such subscriber is required to pay a certain sum for the use of complainant's telephones and for the furnishing of telephone service by the complainant. and that the

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price charged for the use of such telephones is dependent upon the use made thereof; that great care is required and used in the compilation of complainant's said directory, and to the end that persons of Japanese nationality and name may have the same service and the same benefits therefrom that other subscribers receive the complainant has caused to be issued a telephone directory printed in the Japanese language, in which are accurately stated the names and addresses of all persons having Japanese names who are subscribers to said telephone system; that no persons other than those signing said contracts are as a matter of right entitled to the use of the telephones belonging to complainant and to the telephone service furnished by the complainant, and that false, misleading and inaccurate statements of the names or telephone numbers of subscribers contained in a purported directory of subscribers cause great trouble and annoyance not only to the complainant but to large numbers of its subscribers in that, among other things, such subscribers are being continually annoyed by persons ringing their telephones from erroneous information as to the telephone number of a particular subscriber; that on or about the first day of June, 1917, the Nippu Jiji Company, Limited, the respondent herein, caused to be published and issued, and since said date has exposed for sale and is selling a purported telephone directory of the Japanese subscribers to complainant's telephone system printed in the Japanese language; that said directory issued by said respondent is incomplete and inaccurate, and therein are set forth and advertised the names of numerous persons as having telephone numbers and the right to use the telephones of the complainant who have no right to use the same under any contract with the complainant, thus enabling such persons to obtain the benefit of the use of complainant's telephones and service without paying complainant there-



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for; that by reason of the premises the complainant is being defrauded and deprived of the right to collect a monthly charge from persons so advertising in said telephone directory that they are subscribers and have a right to the use of the telephones of the complainant and are entitled to the benefit of its telephone service, who as a matter of fact have no right to be so advertised; that in order to properly conduct complainant's business it is necessary that a central traffic station be maintained at the central office of complainant in Honolulu where persons seeking information relative to telephones and telephone service can obtain the same; that among the persons advertised in respondent's directory as having telephones are numerous persons who have had telephones installed since the publication and issuance of complainant's last telephone directory; that many of such persons have discontinued or will discontinue the use of their said telephones prior to the publication of complainant's next directory in which event the complainant gives the number theretofore used by such a subscriber to a new subscriber with the result that such new subscriber is continually called to his telephone by parties who wish to speak to the former temporary subscriber whose name appears on respondent's directory as having the same identical number; that this difficulty cannot be obviated by the complainant so long as it does not have absolute control over the telephone directories in use by subscribers; that protection to subscribers to telephones is impossible when there is a directory published by persons other than the complainant and in general use containing numbers not listed in complainant's directory; that persons who are members of the family or business associates of a subscriber of the complainant are entitled to have their names placed in complainant's directory upon the payment of the sum of one dollar for each name, pursuant to a

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reasonable rule and regulation of complainant; that the respondent, in violation of the rights of the complainant in the premises, and against the wishes of the complainant, is publishing and continuing to publish and issue and sell to divers and various persons to the great damage and inconvenience not only of the complainant, but to its subscribers, and in violation of the rights of complainant and its subscribers; that by reason of the premises complainant is suffering irreparable injury in that the acts done by the respondent constantly interfere with the proper conduct of the business of complainant, involve constant injury and annoyance to its subscribers and prevent complainant from furnishing satisfactory service to the public; and that the complainant has no plain, adequate or complete remedy at law in the premises. The bill prayed for an injunction prohibiting the respondent, its agents and servants, from publishing and distributing its said telephone directory, and perpetually enjoining them from using the directory published by the complainant for the purpose of compiling therefrom a directory of Japanese subscribers to the telephone system of the complainant, and for such other and further relief as may be just and proper in the premises. The respondent filed a lengthy answer admitting some of the averments contained in the bill of complaint, denying others, and setting up new matter. We deem it unnecessary to recapitulate the averments contained in the answer since the question to be decided is whether the bill set forth a cause entitling the complainant to equitable relief. It does not appear from the record that the complainant replied to the new matter set up in the answer, but no point seems to have been made in the court below of the absence, if such there was, of a replication.

When the case came on for hearing, the pleadings having been read, the circuit judge raised the question

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whether the complainant's bill stated a case for which relief could be given. Counsel for the respondent stated that he had intended to object to the introduction of testimony in support of the bill because there was no equity in the bill. After argument the court sustained the respondent's objection to the introduction of any testimony, whereupon the respondent moved that the bill be dismissed and the court granted the motion. A decree dismissing the bill was entered and therefrom the complainant has appealed.

The first question raised is as to the procedure, the appellant contending that as the respondent had not demurred to the bill, but had answered, it was not correct practice for the court to dismiss the bill, for want of equity in it, upon motion. Section 2477 of the Revised Laws provides that "A defense in equity shall be made by demurrer, plea or answer," and it is argued by counsel for the complainant that to permit the dismissal of a bill upon motion is to add a method of defense not contemplated by the statute. Under Rule 29 of the new federal equity rules by which demurrers and pleas are abolished, and bills may be dismissed for lack of equity upon motion, the motion to dismiss is regarded as equivalent to a general demurrer. *Destructor Co. v. Atlanta*, 219 Fed. 996; *Wright v. Barnard*, 233 Fed. 329. In some jurisdictions the practice prevails apparently without the aid of a rule. 16 Cyc. 464. In *Fletcher on Equity Pleading and Practice*, Sec. 574, it is said, "Motions to dismiss bills for want of equity have, in certain circumstances, been considered and allowed, but they are generally conceded to be not according to approved practice." See also *Grimes v. Grimes*, 143 Ill. 550, 556; *Opitz v. Morgan*, 67 So. (Fla.) 67. But it is held that a court may of its own motion dismiss a bill which does not state facts entitling the complainant to relief. *Fletcher, supra*, Sec. 575. In

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the somewhat analogous instance of the dismissal of a bill because the right to equitable relief has not been shown, at the conclusion of the evidence for the complainant, this court has held that while the court may take such action of its own motion it is not correct practice to dismiss a bill on motion of the respondent unless he also rests his case. *Estate of Keaho*, 17 Haw. 308. We think the same practice should prevail under the circumstances involved here. In this case, though the court first suggested the point, the objection to the receiving of testimony and the motion to dismiss the bill were made by counsel for the respondent. But he did not state that the respondent would not offer evidence if the objection and motion should be overruled, nor did he admit that the facts averred in the bill, though some were denied in the answer, were true. The action of the court in dismissing the bill without requiring the respondent to admit the facts and rest its case, though erroneous, would not, however, be considered reversible error if, in fact, there was no equity in the bill. *In re Title of Pa Pele-kane*, 21 Haw. 175, 178.

The appellant is a quasi-public corporation — a public utility company — and as such is required to furnish reasonably good and efficient telephone service. The gist of the complaint against the respondent, and the grounds upon which the right to relief is based, are, that (1) the company, in the performance of its duty, furnishes to its subscribers, for their convenience and information, a directory giving the names and numbers of all its subscribers, and a special directory in the Japanese language for the use of subscribers of Japanese nationality, that the company has endeavored to properly fulfil its duty in the premises, but that such duty cannot be effectively performed unless it has control of the publication and distribution of such directories to the end

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that their accuracy may be verified; that (2) the directory published by the respondent is inaccurate and incomplete and causes much trouble and annoyance to the company and large numbers of its subscribers, and impairs the efficiency of the company's service; and that (3) in publishing the names of non-subscribers who may be reached by calling up certain telephone numbers the respondent causes an increase in the volume of the company's operations and at the same time deprives the company of a certain amount of revenue which it is entitled to receive. No case in point has been cited in the briefs of counsel, but the lack of precedent is not, of course, conclusive. In *Keauhulihia v. Puahiki*, 4 Haw. 279, 283, the court said, "The doctrine of the law is that all its rules and principles are deemed certain, although they have not as yet been recognized by public adjudications." We are of the opinion that under the theory and practice of equity jurisprudence the averments of the bill, which are taken as true, do state a case for equitable relief. Pomeroy says of the principle "Equity will not suffer a wrong without a remedy" that it is "the source of the entire equitable jurisdiction, exclusive, concurrent, and auxiliary" (1 Pom. Eq. Jur. Sec. 423), and points out that under the limitations upon the generality of the maxim equitable relief will not be awarded unless the right asserted belongs within the purview of municipal law, and not even then if both the right and the remedy belong to the domain of the common law, or if the right to an equitable remedy has been lost, destroyed or waived by the party's own act (*id.* Sec. 424). See also Hughes, *Equity in Procedure*, Sec. 27. The contention of counsel for the appellee that the remedy of the complainant, if it has one, is limited to an action or actions at law upon the contracts it has with its subscribers is not sustained. Upon the facts stated in the bill the complainant is en-

Coke, J., concurring.

titled to relief from such interference by the respondent as impairs the efficiency of its service, annoys its subscribers, and deprives it of revenue which it would be entitled to receive from non-subscribers who desire to have their names inserted in an accurate directory. No contractual relation exists between the complainant and respondent, and the common law can furnish no relief to the complainant with respect to the respondent's interference with the complainant's business. We do not subscribe to the contention of appellee's counsel that the bill of complaint showed no right in the complainant which equity would or could protect. The respondent averred in its answer that the Japanese directory of the complainant is inaccurate and confusing, and that it, and not the respondent's directory, has caused the annoyance, inconvenience and difficulties mentioned in the bill. That would be a matter of proof. We are not to speculate upon what facts a hearing of the case would disclose, nor do we feel obliged to say at this time whether the complainant has shown by its bill that it is entitled to all the relief it prayed for.

The decree appealed from is reversed and the cause remanded for further proceedings.

*R. C. Brown* (*Frear, Prosser, Anderson & Marx* on the brief) for complainant.

*C. C. Bitting* for respondent.

CONCURRING OPINION OF COKE, J.

I concur in the conclusion that the decree appealed from should be reversed. Under the allegations of the bill of complaint, the petitioner, if the facts alleged are proven, is entitled to relief. But I am unable to concur in the conclusion contained in the majority opinion to the effect that the loss of revenues to complainant, which

## Syllabus.

it would receive from non-subscribers, and which has been occasioned by the publication of respondent's directory, affords a proper ground for equitable relief. I am not converted to the idea that the complainant enjoys an exclusive right to publish the names and numbers of its subscribers, and when it is attempted to extend this right to include the publication of the names of non-subscribers I respectfully dissent. I hold to the view that if complainant is to prevail at all in this cause it must do so, not because of the loss of the one dollar which it has been accustomed to collect from each non-subscriber whose name it has printed in its directory, but upon the broader ground that as a public utility its service to the public is being impaired by the wrongful acts of the respondent.

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TERRITORY OF HAWAII, BY B. G. RIVENBURGH,  
COMMISSIONER OF PUBLIC LANDS, v. F. G.  
CORREA.

No. 1009.

ERROR TO CIRCUIT COURT, SECOND CIRCUIT.  
HON. W. S. EDINGS, JUDGE.

ARGUED DECEMBER 17, 1917.

DECIDED DECEMBER 31, 1917.

ROBERTSON, C.J., QUARLES AND COKE, JJ.

**COURTS**—*objection for want of jurisdiction can be raised when.*

Objection for want of jurisdiction, if it exists, may be raised by answer or at any subsequent stage of the proceedings and may be raised for the first time on appeal. It may, as a matter of fact, be raised by the court of its own motion.

**SAME**—*jurisdiction of district courts in summary proceedings between lessor and lessee.*

## Opinion of the Court.

Where a lease provides that the lessor may at any time withdraw all or any part of the demised premises for certain enumerated purposes, the refusal, after notice, of the lessee to part with the possession of the premises required by the lessor for one of the purposes specified in the lease constitutes a breach of a condition of the lease and works a forfeiture thereof, and the lessor may proceed under the authority of chapter 154 R. L. to regain possession of the premises by summary proceeding.

## OPINION OF THE COURT BY COKE, J.

Summary proceedings under chapter 154 R. L. were instituted by the defendant in error herein, who was plaintiff below, in the district court of Makawao, county of Maui, for the recovery of a certain lot of land containing 51.50 acres, the same being lot 13 and a part of the premises demised by the Territory of Hawaii to the defendant, the plaintiff in error, by a general government lease dated April 24, 1911. The land in question is situate at Omaopio and within the district of Makawao, county of Maui. Judgment for the restitution of the property to the Territory of Hawaii was rendered in the district court and the plaintiff in error appealed to the circuit court of the second circuit where judgment was again recovered by the Territory. Correa, the plaintiff in error, comes to this court on a writ of error. Counsel for Correa appeared before this court and abandoned all the specifications of error contained in his assignment of errors and now relies solely upon his contention, which is raised for the first time before this court, that the district court of Makawao was without jurisdiction of the subject-matter of the suit. It has been suggested that the jurisdictional question cannot be raised at this late date. We think it can. If the district court of Makawao was without jurisdiction over the subject matter the entire case necessarily falls to the ground. The objection for want of jurisdiction, if it exists, may be raised by answer or



## Opinion of the Court.

at any subsequent stage of the proceedings and may be raised for the first time on appeal. It may, as a matter of fact, be raised by the court of its own motion. See *Tong On v. Tai Kee*, 11 Haw. 424; *Brown v. Koloa Sug. Co.*, 12 Haw. 409; *Leurers & Cooke v. Redhouse*, 14 Haw. 290; 7 R. C. L. pp. 1042-3.

The question of jurisdiction being the only one properly before us we now proceed to its consideration. It is urged by counsel for the plaintiff in error that summary proceedings are strictly statutory and that the cause at bar is not such a case as is contemplated by the statute which authorizes a proceeding of this nature. Section 2754, R. L., provides:

"Whenever any lessee or tenant of any lands or tenements, or any person holding under such lessee or tenant, shall hold possession of such lands or tenements without right, after the determination of such tenancy, either by efflux of time or by reason of any forfeiture, under the conditions or covenants in any such lease \* \* \* the person entitled to such premises may be restored to the possession thereof in manner hereinafter provided."

The lease between the defendant in error and the plaintiff in error contains the following clause:

"It is mutually agreed that at any time or times during the term of this lease, the land demised or any part or parts thereof may at the option of the lessor \* \* \* be withdrawn from the operation of the lease for homestead or settlement purposes \* \* \* and possession resumed by the lessor, in which event the land so withdrawn shall cease to be subject to the terms, covenants, and conditions of this lease, and the rent hereinabove reserved shall be reduced in proportion to the value of the land so withdrawn."

This provision of the lease is in line with the requirements of section 380 R. L. It is further provided in the lease:

"If the lessee \* \* \* shall fail to well and truly observe, keep or perform any of the covenants and agree-

## Opinion of the Court.

ments on his part to be observed, kept and performed \* \* \* then and from thenceforth, in any of the said cases, it shall be lawful for the lessor, and his successors in office, without warrant or other legal process to enter into and upon the said hereby demised premises, or any part thereof, in the name of the whole, and the same to have again, repossess, and enjoy, as in their first and former estate and right, and thereby terminate this lease."

In May, 1916, the commissioner of public lands, desiring to utilize a part of the premises covered by the lease for homestead purposes, transmitted to the lessee (plaintiff in error) notice that the land in question, to wit, lot No. 13, containing an area of 51.50 acres, was withdrawn for homestead purposes and that the rental to be paid under the lease by the lessee would be reduced accordingly. The lessee (plaintiff in error) thereupon refused to surrender the lot described to the Territory, whereupon these proceedings were instituted in the district court of Makawao. This court said in *Harrison v. McCandless*, 22 Haw. 129, 130: "The summary proceeding was provided for the protection of landlords against tenants who have violated some material condition of the lease, or wrongfully withhold possession after expiration of the lease, in order to avoid the delay and expense incident to actions in ejectment." The lessee (plaintiff in error) subscribed to the terms of the lease which provided among other things that the Territory should have the right to withdraw all or any part of the demised premises for the several public purposes mentioned in the lease, and which included homestead purposes, at any time, and it follows that in order to effectuate this provision there necessarily existed an implied agreement upon the part of the lessee to peaceably surrender possession of so much of the demised premises as might be required by the Territory for any of the purposes set forth in the lease, when requested to so do. The refusal

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of the lessee to part with the possession of the lot required by the Territory constituted a breach of a condition of the lease and worked a forfeiture thereof in so far as the same related to the lot in question. It follows then that a forfeiture having occurred the Territory had the right to proceed under the authority of chapter 154 R. L. to regain possession of the premises by summary proceedings.

The judgment is affirmed.

*Eugene Murphy* for plaintiff in error.

*C. S. Franklin*, Deputy Attorney General, for defendant in error.

ALFRED N. HAYSELDEN v. WILLIAM B. LINCOLN  
AND KEAI LINCOLN.

No. 1032

ERROR TO CIRCUIT COURT, SECOND CIRCUIT.  
HON. W. S. EDINGS, JUDGE.

ARGUED DECEMBER 17, 1917.

DECIDED DECEMBER 31, 1917.

ROBERTSON, C.J., QUARLES AND COKE, JJ.

**EJECTMENT—pleading—proof.**

The plaintiff in ejectment must describe in his complaint the premises which he seeks to recover with certainty and he must prove title to the land so described.

**DEEDS—description of premises conveyed.**

The description of the premises conveyed by a deed must be sufficiently definite and certain to enable the land to be identified, otherwise it will be void for uncertainty.

**SAME—uncertainty in description.**

A deed conveying a number of pieces of property, which de-

## Opinion of the Court.

scribes one piece of property as "the house lot at Halakaa, Lahaina, Territory of Hawaii," without reference to any other deed, instrument or existing condition capable of ascertainment for the purpose of identifying such house-lot, is void for uncertainty.

## OPINION OF THE COURT BY QUARLES, J.

This is an action in ejectment to recover certain land described in the complaint as follows:

"A certain house lot and house situated thereon at Halakaa, Lahaina, in the County of Maui, Territory of Hawaii, and situated on the makai side of Main Street leading to Olowalu from Lahaina \* \* \* lying between the lot of A. N. Hayselden on the west and the lot of Mrs. Annie K. Woolsey on the east, and having a width on Main Street of about eighty (80) feet and a depth of about one hundred and twenty (120) feet, and running along the seashore about eighty (80) feet, and of which said lot the plaintiff is the owner in fee simple."

The case was tried jury waived. Considerable hearsay evidence was admitted, some of it over the objections of the defendants, and some of it without objection. The plaintiff testified that he owned the premises by reason of a deed from F. W. Beckley to him, which deed bears date July 26, 1907, and was introduced in evidence. The description of the premises as set forth in the complaint is not contained in the deed and the only reference therein to any house-lot or lots is the following: "One-half of the Iliaina of Puunauiki situate at Lahaina, being mahele award No. 31, including the house-lot on the beach" and "all that parcel of land (house-lot) situate at Polanui, said Lahaina, described in Royal Patent No. 1191." The only attempt to identify the premises described in the complaint as either of the house-lots named in the said deed was by the plaintiff who, while a witness in his own behalf, referring to the deed from Beckley to himself, said: "The house lot in question is included in that description 'including the house-lot on the beach,' " and

## Opinion of the Court.

a statement by Mrs. Nakuina, while testifying, that the lot occupied by the defendants "is at Halakaa and Puunau." The deed from Beckley to plaintiff, relied on to show title to the premises in dispute, is not sufficient evidence of itself to prove title in the plaintiff. Neither the original nor a certified or other copy of Award No. 31 or of Royal Patent No. 1191 was introduced or offered in evidence. The statement of the plaintiff that "The house lot in question is included in that description 'including the house-lot on the beach,' " would seem to be a mere conclusion of the witness, or perhaps his interpretation of the deed, and in the absence of extrinsic evidence identifying the property in dispute as one of the house-lots mentioned in the said deed we are unable to hold that there is more than a scintilla of evidence, as defined in *Holstein v. Benedict*, 22 Haw. 441, that the plaintiff has title to the premises described in his complaint. Plaintiff also introduced in evidence certified copies of two deeds, one from Kamaipuupaa to Frederick W. Beckley, father of plaintiff's grantor, and one from Emma M. Nakuina to plaintiff's grantor. The only reference in either of these last named deeds to any house-lot, appearing from an inspection thereof, is as follows: In the deed from Kamaipuupaa to Frederick W. Beckley is the following: "3rd. Also the House Lot at Halakaa, in Lahaina, Maui." And in the deed from Mrs. Nakuina to plaintiff's grantor, after the attestation clause, we find the following: "And it is further included in this deed that certain house lot at Halakaa, in said Lahaina, Island of Maui aforesaid."

At the close of the plaintiff's case the defendants moved for a nonsuit, among other reasons on grounds stated by counsel as follows: "We ask for a nonsuit on the ground that there is a variance between the proof and the pleadings—the proof being a matter of record being by deed failing to show that the plaintiff has acquired any interest

## Opinion of the Court.

whatsoever in the land in question. \* \* \* And further on the ground that the evidence in this case, the deed from Frederick W. Beckley to plaintiff in this case does not describe the land in question in this case but other and different land." The court denied this motion, whereupon the defense rested, without introducing any evidence, and moved for judgment, which motion the court also denied and rendered judgment as prayed for in favor of the plaintiff.

The case comes here on writ of error, the defendants assigning eight errors, but they have waived all of them except those specified as to the denial of their motion for a nonsuit, the denial of their motion for judgment, and to the judgment in favor of the plaintiff.

Whether the house-lot in question is described or mentioned in Award No. 31 or in Royal Patent No. 1191 is to be determined from one or the other of those instruments, as the case may be, and not from plaintiff's interpretation of the deed from Beckley to himself. It is a well settled rule that descriptions of land in a deed must be reasonably certain, either by express language contained therein or by reference therein to some other deed or instrument or existing conditions capable of ascertainment. If plaintiff's deed referred to the premises in question as the house-lot described in Award 31, still plaintiff would not be entitled to judgment under the evidence in this case. It may be that the house-lot on the beach is a part of Mahele Award 31, but it is not so described in the complaint nor in the deed from Beckley to the plaintiff. Some ambiguities in a deed may be cleared away by extrinsic evidence. In *Kaleleonalani v. Smith*, 4 Haw. 82, an ejectment case, the description in the will under which the plaintiff claimed is "the premises at Waikiki, Oahu, known as my marine residence." The court admitted evidence to show that the testator's "marine resi-

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dence" comprised a tract of several acres. Suppose the evidence showed that the testator owned two marine residences at Waikiki and stopped there, the devise would probably have failed by reason of uncertainty. Here the description, "house lot on the beach," is general, is not by name, and there is no evidence showing how many "house lots on the beach" plaintiff's grantors—immediate, intermediate, or remote—owned. So far as the evidence in this case shows the immediate, intermediate or remote grantors of plaintiff may have had a number of "house-lots on the beach" at Lahaina, or may have had none. How many house-lots there are at Halakaa, in Lahaina, is not shown by the evidence in this case. The statement of the witness, Mrs. Nakuina, that the premises in question are at Halakaa and Puunau makes the exact location of the premises in dispute uncertain. This lot cannot be at two places. Part of it may be at Halakaa and part of it may be at Puunau, but how much of it or what part of it is at either place is not shown by the evidence. Testimony that the lot in question is at Halakaa would not be sufficient in the absence of evidence identifying the premises as the house-lot mentioned in the deed to plaintiff from Beckley. The plaintiff, relying upon the deed from Beckley to him to prove title to the premises in controversy, should have shown that said deed conveyed to him the premises in dispute. If Beckley, plaintiff's grantor, owned the premises described in plaintiff's complaint, that would not help the plaintiff here unless Beckley conveyed them to the plaintiff. The plaintiff in ejectment must describe in his complaint the premises which he seeks to recover with certainty (*Leialoha v. Mahiai*, 23 Haw. 711), and he must prove title to the land described in his complaint. Relying upon a title of record the plaintiff must prove that he has such title (*Mendes v. De Cova*, 22 Haw. 636). The deed from Mrs. Nakuina, containing the general

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description above quoted, and the deed from Kamaipuu-paa to Frederick W. Beckley are too general to identify any house-lot. Mr. Devlin in his work on Deeds (2d ed.) Vol. 2, Sec. 1010, says: "The description of the premises conveyed must be sufficiently definite and certain to enable the land to be identified; otherwise it will be void for uncertainty." See also to the same effect *Howard v. North*, 51 Am. Dec. 769, 782; *Wofford v. McKinna*, 76 Am. Dec. 53; *Lumbard v. Aldrich*, 28 Am. Dec. 381, 8 N. H. 31; *Freed v. Brown*, 41 Ark. 495; *Campbell v. Johnson*, 44 Mo. 247; *Gatewood v. House*, 65 Mo. 663; *George v. Bates*, 90 Va. 839; *Williams v. Ry. Co.*, 50 Wis. 71. Where a general description of property in a deed is so indefinite that the land therein cannot be identified other instruments not referred to in the deed are not admissible for the purpose of clearing away the uncertainty. *Cunha v. Gallery*, 18 L. R. A. N. S. 616. The words "the house-lot on the beach" could not in any event convey any house-lot not included in Award No. 31. *Cummings v. Browne*, 61 Ia. 385. In *Ray v. Card*, 21 R. I. 362, 43 Atl. 846, the description in the contract of sale was "that lot." This was held to be no description and the contract void under the statute of frauds. In *Boardman v. Reed*, 6 Pet. 327, the court at page 344 said: "But if the land granted be so inaccurately described as to render its identity wholly uncertain, it is admitted, that the grant is void." The only reference in the description in plaintiff's complaint to anything contained in either of the deeds introduced in evidence, and especially to the deed from Beckley to plaintiff, is to "a certain house lot \* \* \* at Halakaa, Lahaina." There is no reference in the complaint to the iliaina of Puunauiki or to Mahele Award No. 31. If the premises sought to be recovered were proven by the evidence to be a portion of said iliaina and described in Mahele Award No. 31 as a part of such iliaina such evidence



## Opinion of the Court.

would not correspond with the allegations in the complaint in so far as determining the identity of the premises in question. The allegations in the complaint describing this house-lot as between two other house-lots and as being at Halakaa would indicate that there are more than one house-lot on the beach at Halakaa. If Mahele Award No. 31, referred to in the deed to the plaintiff describes "the house lot on the beach" with sufficient certainty, that fact might be regarded as sufficient to remove the ambiguity in plaintiff's deed. He would then fail for the reason that the descriptions in the other two deeds do not, by direction or indirection, inferentially or otherwise, refer to the house-lot at Halakaa as being described in said Mahele Award No. 31. Owing to the uncertainty of the description of the house-lot at Halakaa contained in the deed from Mrs. Nakuina and in the deed from Kamaipuupaa those deeds are void for uncertainty of description so far as "the house lot at Halakaa" is concerned. The evidence is not sufficient to establish the allegations of the complaint and the motion for nonsuit should have been granted. It therefore follows that the judgment was erroneous.

The judgment is reversed and the cause remanded with instructions to the circuit court to grant the defendants' motion for nonsuit.

*Eugene Murphy* (*D. H. Case* with him on the brief) for plaintiffs in error.

*E. R. Bevins* for defendant in error.

## Syllabus.

SENTARO YANAGI *v.* KENSHIRO OKA.

No. 1058

APPEAL FROM DISTRICT MAGISTRATE OF NORTH KONA.

SUBMITTED MARCH 19, 1918.

DECIDED MARCH 22, 1918.

COKE, C.J., QUARLES AND KEMP, JJ.

LANDLORD AND TENANT — *summary possession — jurisdiction of district courts.*

In a summary proceeding plaintiff alleged a wrongful withholding by defendant after the termination of an alleged tenancy; defendant filed his affidavit by way of answer or plea to the jurisdiction denying the tenancy alleged and claimed ownership and right of possession by virtue of purchase from plaintiff: Held, that the title to real estate was involved and that the cause should have been dismissed for want of jurisdiction.

## OPINION OF THE COURT BY KEMP, J.

This case was brought under chapter 154 R. L. 1915 by Sentaro Yanagi against Kenshiro Oka in the district court of North Kona, Territory and County of Hawaii, to recover possession of certain land.

The complaint alleges that the plaintiff at all times mentioned was the owner of a leasehold interest in and to that certain piece of land (describing it). That on or about the 1st day of December, 1912, and while plaintiff was in possession of said land, for a valuable consideration the defendant entered into a parol executory contract or agreement to purchase from plaintiff plaintiff's interest in said land. The defendant went into possession of said land under and by virtue of said contract or agreement and thereby became tenant at will of plaintiff and such tenancy still continues. That said defendant has defaulted in the terms and conditions by him to be performed and

## Opinion of the Court.

has neglected and refused to pay the agreed purchase price for said premises as in said agreement specified. That on the 26th day of September, 1917, plaintiff entered upon said premises, rescinded and made null and void the aforesaid contract or agreement of sale, re-entered upon said premises and took possession thereof. That thereafter on said 26th day of September, 1917, demand was made by plaintiff upon defendant that he surrender possession of the said premises held by him as tenant aforesaid, but defendant neglected and refused for the period of ten days after said demand to quit the possession thereof and still neglects and refuses so to do. That said defendant unlawfully and against the rights of the plaintiff holds over and continues in possession of said premises, by reason whereof the plaintiff has sustained damages in the sum of \$250.

The prayer is for judgment for possession of said premises and for damages, etc.

On the return day oral demurrer was interposed by the defendant and by the court overruled. Thereupon the defendant answered by affidavit (omitting the formal parts) as follows:

"That he is the owner of that leasehold covering the possession of the real estate mentioned in the plaintiff's complaint, by virtue of an agreement had between the plaintiff and defendant on the first day of December 1912, and on the second day of January 1913; that defendant claims and is entitled to the possession of the said real estate, and, therefore, the interest in said land is vested in the defendant and not the plaintiff; that the defendant is ready and willing to try the issues involved in the title to the land aforesaid; that this court is without jurisdiction to hear and determine the right, title and interest and equities of the parties to this action in the above land; hence, the defendant herein prays that plaintiff's action be dismissed for want of jurisdiction of this court."

## Opinion of the Court.

The district magistrate thereupon ruled, as shown by the record, as follows:

"That the affidavit produced by the defendant has failed to show the source or nature of the title upon which the defendant claims as an owner of the premises to comply with rule 15 of the supreme court. So the affidavit is not sustained."

Thereafter and before the hearing of the case by the district magistrate defendant filed another affidavit which is (omitting the formal parts) as follows:

"1. That this court cannot hear the trial of said cause upon the ground that the title to said real estate and land is involved in the manner hereinafter set forth, and therefore this court cannot hear the trial of said cause for want of jurisdiction.

"2. That the defendant herein claims the ownership and is the owner of and entitled to the possession of that certain piece or parcel of land together with all the improvements on the land described in plaintiff's declaration and claims a right thereto adversely to the plaintiff herein, that the source of title to said premises and possession thereof was and is by virtue of a purchase by the defendant and plaintiff herein, on or about the first day of December A. D. 1912 and reaffirmed on or about the second day of January A. D. 1913, and ever since, and now, the defendant had taken possession of and is now in open possession of said premises adversely to the plaintiff herein. Therefore the title and interest to said premises is in the name of the defendant.

"That the title to said land is a leasehold from Bishop Estate which will terminate on or about January 1st A. D. 1930."

Whereupon the district magistrate made the following ruling:

"The court overruled the affidavit on the ground that the allegation in the complaint shows that the defendant only has a title under the conditions of that parol agreement

## Opinion of the Court.

as the defendant has failed to show the source of his title in the affidavit other than the agreement of sale, hence the court overrule it."

It appears that the defendant then plead the general issue.

Upon the foregoing pleadings the case proceeded to trial and after a hearing the district magistrate gave judgment in favor of plaintiff and against the defendant from which judgment the defendant has appealed to this court upon points of law set forth as follows:

"1st. That the court erred in overruling defendant's demurrer.

"2nd. That the court erred in holding that the question of title to land was not involved in accord with and as evidenced by defendant's affidavits filed and interposed in the above entitled cause.

"3rd. That the court erred in holding that the relation of landlord and tenant existed between plaintiff and defendant, and that due proof thereof was adduced in and at the hearing herein.

"4th. That the court erred in rendering and entering judgment in said cause for the plaintiff and against the defendant for the immediate restitution of the possession of said premises in controversy.

"5th. That the court erred in denying defendant's motion for judgment for defendant."

We think it unnecessary to consider any of the points of law except No. 2 as set forth above.

"We think that a denial of tenancy, especially if in writing as in this case, even where the tenancy is well set forth in the complaint, and a setting up of another title, hostile to the plaintiff's title, whereby the magistrate becomes advised that the defendant claims adversely to the plaintiff, and not under him, is sufficient to take it out of the jurisdiction of district magistrates under these statutes; and it seems to us that if, after such a disavowal and setting up of an adverse title on the part of the defendant, the magistrate could go on and inquire whether

## Opinion of the Court.

his title is good, he would be passing upon the defendant's title, and stretching the authority of the law greatly beyond what was contemplated; and that the consequences of such a holding would be more likely to lead to confusion and a usurpation of authority on the part of the magistrate, than the holding as at present is likely to render the statute nugatory and deprive the landlords of their remedy" (*Coney v. Manele*, 4 Haw. 157).

"A careful examination of the statute leads us to the conclusion that the police court could only have jurisdiction in cases where the relation of landlord and tenant *confessedly* existed" (*Kaaihue et al v. Crabbe*, 3 Haw. 768).

In the recent case of *Harrison v. McCandless*, 22 Haw. 129, the cases of *Kaaihue v. Crabbe* and *Coney v. Manele* are quoted with approval and it is further stated that "we interpret the rule to extend only to cases where the relation of landlord and tenant, as alleged in the plaintiff's declaration, is not denied."

The affidavits of defendant filed in this case by way of answer, while very clumsily worded, certainly negative the idea that the relation of landlord and tenant existed or ever had existed between plaintiff and defendant and put in issue the title to the land involved and the district magistrate was thereby apprised of defendant's claim of title, its source, nature and extent, thereby fully complying with Rule 15 of this court. We therefore hold that the district court erred in not sustaining defendant's plea to the jurisdiction and dismissing the cause.

The judgment of the district court is reversed and the cause remanded to the district court with instructions to dismiss the cause for want of jurisdiction.

*H. G. Middleditch* for plaintiff.

Defendant in person.

WONG WONG v. SKATING RINK, 24 Haw. 181. 181

Syllabus.

WONG WONG v. HONOLULU SKATING RINK, LIMITED, A CORPORATION, MORRIS ROSENBLDT AND FRED HARRISON.

No. 1041.

ERROR TO CIRCUIT COURT, FIRST CIRCUIT.

HON. C. W. ASHFORD, JUDGE.

ARGUED MARCH 19, 1918.

DECIDED MARCH 26, 1918.

COKE, C.J., QUARLES AND KEMP, JJ.

**MECHANICS' LIENS—*sufficiency of notice.***

A notice of lien for labor and material used in constructing a building, filed with the contractor, sufficiently describes the material and labor when a lump sum agreed to be paid the contractor by the contracting owner is stated although no itemized statement of the labor and material is embodied in the notice or in a bill of particulars attached to the notice, the notice otherwise sufficiently stating other matters necessary to a clear understanding of the nature and amount of the lien claimed.

**SAME—*building required by lease—agency.***

Where a lease requires the construction of a certain building by the lessee upon demised premises, which building becomes the property of the lessor, its construction is a mutual or joint enterprise, the lease and contract for constructing the building are correlated and the lessee is the agent of the lessor for the purpose of constructing the building to the extent of charging the property with a mechanic's lien for labor and material furnished and used in the construction of such building.

**SAME—*same—same—demands.***

Where the owner of demised property requires his lessee to construct a certain building thereon the lessee is the agent of the owner and after filing notice of a mechanic's lien for labor and material used in the building demand is made upon such agent but not upon the owner such demand is sufficient.

## Opinion of the Court.

## OPINION OF THE COURT BY QUARLES, J.

Plaintiff in error, Wong Wong, hereinafter called the plaintiff, commenced this action against the defendants in error, the Honolulu Skating Rink, Limited, a corporation, hereinafter called the corporation defendant, and Morris Rosenbledt and Fred Harrison, hereinafter called the defendants, to obtain a personal judgment against said corporation defendant for moneys claimed to be due for labor and material furnished and used in the erection of a certain building in Honolulu upon certain described premises, and a lien against said building and premises for the amount claimed. At the trial below the plaintiff offered in evidence a notice of lien with bill of particulars thereto attached, which the trial court refused to admit in evidence against the defendants Rosenbledt and Harrison but admitted in evidence against the corporation defendant. As the cause seems to have been decided principally upon the ruling of the trial court that the notice of lien was insufficient, and, owing to certain omissions, void, and that no lien attached to the premises, we here give the said notice of lien held by the trial court to be insufficient, omitting the description of the premises, to wit:

*"Notice is hereby given to all whom it may concern:*

*"That Wong Wong, of the City and County of Honolulu, Territory of Hawaii, claims a lien under Chapter 140, Sections 2173-2178, of the Revised Laws of Hawaii, 1905, as amended by Act 97 of the Session Laws of 1909, for the price agreed to be paid for labor and material furnished to be used and used in the construction of a certain building and structures situated upon the premises hereinafter described (which price does not exceed the value and is the value of said labor and material), upon such building and structures, as well as upon the interest of*



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the Owners of said building and structures in the land upon which the same is situated:

“That the amount of the claim for labor and material so furnished is the sum of Seven Thousand Thirteen and 60/100 Dollars (\$7,013.60), being the balance due for the price agreed to be paid for such labor and material so furnished to the Honolulu Skating Rink, Limited, for said building and structures and used in the construction of the same, all of which is shown by the itemized account hereto annexed, marked ‘Exhibit A,’ and made a part hereof; that no part of said amount has been paid, excepting the sum of Two Thousand Four Hundred Seventy Dollars (\$2,470), and that the balance, namely, the sum of Four Thousand Five Hundred Forty-three and 60/100 Dollars (\$4,543.60) is due, owing and unpaid to said Wong Wong, and for this amount he claims a lien; said labor and building material including all the work in the erecting and completing of a one-story building to be used as a skating rink on the hereafter described premises and incident thereto and all scaffolding, implements and cartage necessary for the performance of said work, and also for the labor and building material, including lumber and hardware, for the extra work set out in said ‘Exhibit A’ and described therein.

“That the property upon which said building and structures have been constructed is described as follows: \* \* \*

“That the names of the Owners of said land, building and structures are said Morris Rosenbledt and Fred Harrison;

“That the said Honolulu Skating Rink, Limited, a Hawaiian corporation, is the lessee of said premises under a lease for five (5) years dated the 21st day of September, 1914, and recorded in the Registry Office in Book 403 page 376, and in said leasehold contracted with said Owners to cause said building and structures to be erected, and, when erected, to become a part of the premises and owned by said Owners, and this lien is claimed against the interest in said land and buildings of said Morris Rosenbledt, Fred Harrison and the Honolulu Skating

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Rink, Limited, to secure said sum of Four Thousand Five Hundred Forty-three and 60/100 Dollars (\$4,543.60);

“That the said Honolulu Skating Rink, Limited, contracted for said material and labor and for the construction of said building and structures by said Wong Wong, and at their instance and request the said labor and material was furnished by said Wong Wong, for which the aforesaid lien is claimed; that said material and labor were furnished between the 21st day of September and the 2nd day of November, 1914, in the construction of said building and structures, and the same were completed on the 2nd day of November, 1914.

“Dated, Honolulu, December 11, 1914.”

This notice of lien was verified by the plaintiff, filed in the office of the circuit court of the first circuit, and copy thereof served upon all of the defendants. The plaintiff identified and offered in evidence a building contract for the erection of said building at the stated cost price of \$6463.60, signed by plaintiff and the defendant corporation; specifications for the same; evidence that certain additions agreed to by the plaintiff, the defendant corporation and the supervising architect were made, and the certificates of the architect showing the completion and acceptance of the building under the contract and the completion of the additions or alterations thereto and the value of the same aggregating the total sum of \$7013.60, all of which the trial court refused to admit against the defendants Rosenbledt and Harrison but admitted as against the defendant corporation. At the close of the hearing the defendants Rosenbledt and Harrison moved for judgment of nonsuit mainly on the ground that the notice of lien did not contain a description of the labor and material used in the construction of the building and did not state the amount for which the lien is claimed and therefore was not and is not such notice of lien as is required by the statute. The motion for nonsuit was

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granted as against the defendants Rosenbledt and Harrison. The errors assigned challenge the correctness of these rulings.

We will first consider the sufficiency of the notice of lien. It is better practice to state in the notice of lien the particular description of the labor and material used in the construction of the building upon which the lien was claimed but our statute does not require a bill of particulars to be filed with the notice of lien. Section 2863 R. L. provides that "Any person \* \* \* furnishing labor or material to be used in the construction or repair of any building \* \* \* shall have a lien for the price agreed to be paid for such labor and material \* \* \* upon such building \* \* \* as well as upon the interest of the owner of such building \* \* \* in the land upon which the same is situated." Section 2864 R. L., among other things, provides that the "notice shall set forth the amount of the claim, the labor or material furnished, a description of the property sufficient to identify the same, and any other matter necessary to a clear understanding of the same." Tested by these provisions did the notice of lien answer the objects and purposes of the statute? The amount of the lien claimed for labor and material is stated to be \$7013.60, the price agreed to be paid for such labor and material, upon which payments to the extent of \$2470 have been made, leaving a balance of \$4543.60, and the exhibit attached to the notice of lien shows the contract price for the building to be \$6463.60, and additional labor and material not covered by the contract price, but authorized by the contract, to the extent of \$550. The bill of particulars is as follows:

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“Honolulu, T. H., Dec. 5th, 1914.

“Honolulu Skating Rink, Limited,

“To Wong Wong Dr.

“Dealer in

“Hardware, Painting Material, Windows & Doors.

“Maunakea St.

Contract price for building.....	6463.60
Extra Seats .....	100.00
Surfacing Vestibule .....	20.00
Increasing height of bldg. 4'.....	300.00
Stair .....	15.00
Extra Leader .....	5.00
Extra Door .....	8.00
Extra 3-piece Steps .....	9.00
Lifting Seats .....	20.00
Extra Sleeper under Floor.....	20.00
Carbolinium .....	9.00
Labor laying carbolinium .....	6.00
Carpenter labor (putting shoes on joists) .....	30.00
Ticket Platform .....	8.00
	<hr/>
	\$7013.60
Less Cash on a/c from Nov 9th to Dec 8th, 1914 inclusive paid to Lewers & Cooke, Ltd.	<hr/>
	2470.00
	<hr/>
	\$4543.60”

The notice of the lien with the exhibit attached as a part thereof shows that the building had been erected at the contract price of \$6463.60, the price to be paid for labor and material by the contract owner, and items by way of extras, additions or alterations to the building to the extent in value of \$550. The notice states that the claim includes “all the work in the erecting and completing of a one-story building to be used as a skating rink on the hereafter described premises and incident thereto and all scaffolding, implements and cartage necessary for

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the performance of said work, and also for the labor and building material, including lumber and hardware, for the extra work set out in said 'Exhibit A' and described therein." It states facts showing the relations existing between the defendant corporation and the other defendants and refers to the lease between the parties. What more is necessary for a clear understanding of the nature and extent of the lien claimed? To hold that this notice is not sufficient we would necessarily have to hold that under our statute an itemized statement of every article of material used and the hours and days of labor performed by various laborers working on the building must be set forth in the notice of lien or attached thereto in a bill of particulars. We think that this notice was sufficient to give the corporation defendant a full understanding of the amount, nature and basis of the claim of lien by the plaintiff. Did it give the defendants Rosenbledt and Harrison such notice? The corporation defendant held the premises under lease from the defendants Rosenbledt and Harrison and in the lease and as a part consideration therefor the lessors required the lessee to erect the building that was erected, providing in the lease that the cost thereof should not be less than \$6000. On behalf of the defendants Rosenbledt and Harrison it is contended that because the building contract bears date September 20, 1914, and the lease bears date September 21, 1914, and the term of the demise stated in the lease did not commence to run until November 1, 1914, that the defendant corporation had no interest in the premises whatever, was a stranger to the ownership, and that defendants Rosenbledt and Harrison could not be held or their property subjected to a lien for labor and material entering into the construction of a building erected without their consent or authority, direct or indirect. This contention was also made in the case of a claim upon this

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same building for materials furnished the plaintiff as contractor by a material-man, wherein all the parties to this action were defendants, and we there refused to sustain the contention, but held (see *Lewers & Cooke v. Wong Wong*, 22 Haw. 765) that the erection of the building being required by the terms and conditions of the lease a contractual relation existed sufficient to answer the requirements of our statute; that the erection of the building under the terms of the lease is to be regarded as a "joint or mutual enterprise;" that the lessors "were parties to the erection of the building, and the lessee was their agent, not for the purpose of creating any personal liability against them, but to cause the improvement to be placed upon the land." We regard the ruling in the *Lewers & Cooke* case as correct and as all of the parties to this action were parties to that action the decision there binds them here. The long and able argument made by counsel for defendants Rosenbledt and Harrison, based upon the fact that as the building contract bears a date one day prior to the date of the lease that Rosenbledt and Harrison cannot be bound, is without merit and we regard it as technical. We view the transactions as correlated and the lease as the express consent of the lessors to the erection of the building which was to become their property, for which they were to receive rent, and for which, upon a termination of the lease, whether by efflux of time or breach of condition or otherwise, the building would pass with the land into the possession of the lessors. Under the terms of the lease the building, when erected, was not the property of the lessee but of the lessors. The incident or accident that the contract bears date the 20th and the lease the 21st of the same month does not affect the rights of the parties at all. The contract under which the building was erected was

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authorized by the lessors; they consented to the erection of the building and the contract therefor was a necessary incident and it would be a travesty on justice, law and right to permit their property to escape liability under the circumstances. Having required the construction of the building, fixing the minimum cost thereof at \$6000, and having entered into a lease by the terms of which they would come into possession of the building upon breach of conditions of the lease or its termination, they are in no position to claim that the building was erected without their consent or authority. Under the circumstances, the lease and building contract being correlated, the notice of a lien, as we hold, being sufficient as to the corporation defendant, the lessee, is sufficient as to the lessors, defendants Rosenbledt and Harrison. We agree with the reasoning in the case of *Baldwin v. Spear Bros.*, 64 Atl. (Vt.), 235, wherein the court said: "The object of the statute creating mechanics' liens is security. The lien is purely statutory, and, if established, effects a preference. The person asserting it, therefore, should be held to a reasonably strict compliance with the statutory requirements. *Piper v. Hoyt*, 61 Vt. 539, 17 Atl. 798. But the statute is a useful one and should not be so strictly construed as to defeat its purpose, or to render it impossible in the ordinary course of business for one entitled to secure its benefits. A substantial compliance with its terms is all that is required, and nicety of form is not essential. 2 Jones, Liens, § 1391. The object of the memorandum required to be filed in the clerk's office is to give notice to the owner and persons dealing with the property that it stands charged with the payment of the bills for labor and material which went into it under such a contract as entitled the claimant to his lien. \* \* \* It is not necessary to specify therein whether the contract was in writing

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or not. That question is entirely immaterial under the statute. 2 Jones, Liens, § 1236. The terms of the contract need not be set forth since the statute does not so require. \* \* \* Nor is it necessary that the memorandum in a case like this, at least, should specify what part of the claim was for materials and what part for labor. This would manifestly be impossible where as here the labor and materials were furnished at a lump sum. The charge for the extra work and materials furnished by the contractors during the performance of their agreement was properly included in the claim and constitutes a valid part of the lien." In *Allen & Robinson v. Redward*, 10 Haw. 151, the court at page 161 intimates very strongly that where a lien is claimed by the contractor for all of the labor and material furnished for a building under an entire contract a general description is sufficient. In *City Mill Co. v. Horita*, 21 Haw. 585, the court at page 588 said: "The modern tendency is undoubtedly towards a liberal enforcement of laws giving mechanics and material-men a lien upon property made valuable by their labor and material and therefore towards a liberal construction of descriptions, in the notices of lien, of the property against which the lien is sought. Technical accuracy of description is not required." This rule of construction applies also to descriptions of labor and material entering into the construction of a building. A notice of lien for labor and material used in a building, filed by the contractor, sufficiently describes the material and labor when a lump sum agreed to be paid the contractor by the contracting owner is stated although no itemized statement of the labor and material is embodied in the notice or in a bill of particulars attached to the notice, the notice otherwise sufficiently stating other matters necessary to a clear understanding of the nature and amount of the lien claimed. We hold that the general description in



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the notice supplemented by the bill of particulars was and is sufficient. The trial court erred in refusing to admit the notice of lien, the contract, specifications, and the architect's certificates in evidence against all of the defendants and in holding the notice of lien to be insufficient.

It is urged on the part of defendants Rosenbledt and Harrison that as no demand was made upon said defendants after the filing of the notice of lien and before the commencement of this action that their property cannot be bound for a lien claimed by plaintiff. We have held that the statute requires demand on the owner after the notice of lien is filed and prior to commencing action for its enforcement (*Lewers & Cooke v. Fernandez*, 23 Haw. 744; *Lewers & Cooke v. Wong Wong*, 24 Haw. 39). The evidence shows that demand was made by the plaintiff upon the corporation defendant but not upon the defendants Rosenbledt and Harrison after the notice of lien was filed and before this action was commenced. The defendants having engaged in a joint and mutual enterprise, their interests being correlated, we think that they should be regarded in the light of joint obligors, not so far as personal liability is concerned, but so far as their interest in the property involved is affected by plaintiff's lien. It has been held that one joint obligor is the agent for his co-obligors and may bind his co-obligors by a new promise on the joint obligation. *Macaulay v. Schurmann*, 22 Haw. 140. By analogy the same rule should apply here owing to the mutuality of the interest in the building upon which the lien is claimed by plaintiff. But irrespective of that view the defendants Rosenbledt and Harrison are bound by the demand made upon the defendant corporation owing to the limited relation of principal and agency

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which existed between them as herein shown. In *Lewers & Cooke v. Wong Wong*, 22 Haw. 765, we held that the corporation defendant here was the agent of the defendants Rosenbledt and Harrison for the erection of the building for which the lien is here claimed. The relation of principal and agent, limited as it was, presents the question whether demand upon the corporation defendant was sufficient demand upon the other defendants. We think that it was and so hold. *Scholey v. Halsey*, 72 N. Y. 578, 582; *Neff v. Elder*, 84 Ark. 277; *Fay v. Fitzpatrick*, 130 Ia. 279; *Colorado Iron Works v. Taylor*, 12 Col. App. 451. The agency need not be an express one but may be one implied from the actions of the parties or surrounding circumstances. Phillips on Mechanics' Liens, 2 ed., Sec. 65.

The judgment of nonsuit entered against the plaintiff as to the defendants Rosenbledt and Harrison is reversed and the cause is remanded to the circuit court for further proceedings consistent with the views herein expressed.

A. L. Castle (Castle & Withington on the brief) for plaintiff in error.

E. C. Peters for defendants Rosenbledt and Harrison.

Syllabus.

C. B. DWIGHT *v.* S. ICHIIYAMA, M. YAMASHIRO  
AND D. K. HAIDA.

No. 1055.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

HON. S. B. KEMP, JUDGE.

ARGUED MARCH 25, 1918.

DECIDED MARCH 28, 1918.

COKE, C. J., QUARLES, J., AND CIRCUIT JUDGE ASHFORD  
IN PLACE OF KEMP, J., DISQUALIFIED.

NEW TRIAL—*approaching juror—waiver.*

In a case where there were three defendants, after the jury had been instructed and retired to consider of their verdict they reported to the court that one juror had been approached by a stranger and requested to find for the defendant; two of the defendants thereupon moved that the jury be discharged and a mistrial entered, which motion was denied; plaintiff did not join in the motion nor object to the ruling of the court; the jury returned a verdict against one defendant but in favor of the two defendants asking the discharge of the jury; later plaintiff moved for a new trial on the sole ground that a juror had been approached and asked to find for the defendant: Held, that the motion for new trial was properly denied; that plaintiff by his silence and inaction had waived the irregularity of which he complained.

SAME—*same.*

It is proper to deny a motion for new trial based upon the ground that a stranger who is not shown to have acted by procurement or with the knowledge or consent of any party to the action approached one of the jurors with the request that he find for the defendant in the absence of a showing that the verdict rendered was not authorized by the evidence and the law of the case and no showing made that the jury or any one of the jurors were influenced by such request.

SAME—*same.*

If the successful party is shown to have tampered with a juror

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the verdict in his favor should be set aside so as to remove the court's proceedings from suspicion of undue influence and as punishment for wrong-doing.

## OPINION OF THE COURT BY QUARLES, J.

This is an action of assumpsit brought by the plaintiff upon a promissory note assigned to him by the payee against the defendant Ichiyama, the payor, and the defendants Yamashiro and Haida, indorsers thereon. The cause was tried before a jury, and after the evidence had been heard, the jury instructed and retired to consider their verdict, one of the jurors stated to the jury that he had been approached by a man whom he did not know who asked him to find for the defendant, whereupon the jury, through its foreman, reported to the court and the juror who made the complaint stated that a chinaman, a stranger to him who said that he was in the office of the fishery company, came to his house and asked him to find for the defendant and the next morning came to his office. Counsel for the defendants Yamashiro and Haida then moved that the jury be discharged and a mistrial entered, to which motion no joinder nor objection was made by the plaintiff or his counsel. The court, after interrogating the jurors as to the probable effect of the statement, concluded that the motion to discharge the jury should be denied and overruled the motion, instructing the jury to ignore this statement and to not let it influence them one way or the other. The said defendants excepted to the ruling of the court but no objection or exception was made or taken thereto by the plaintiff. The jury found in favor of the plaintiff as to the payor, defendant Ichiyama, but found in favor of the two defendants Yamashiro and Haida. No exception was taken to the verdict but later the plaintiff moved for a new trial based upon the

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ground that the record shows that one of the jurors was approached as to the verdict with reference to two of the defendants which communication may have influenced said juror and said jury to have returned the verdict in favor of said defendants. This motion for a new trial was denied, to which the plaintiff excepted, and it is upon a bill of exceptions, in which this is the only exception, that the cause is before us.

It is argued by the plaintiff that the motion for a new trial should have been granted as a punishment for tampering with the jury and for the purpose of protecting the good name of the court and jury from suspicion of corruption. Courts should be prompt to set aside a verdict which has been secured by corrupt or improper acts of the successful party, and this, not only in the interest of an honest and proper administration of justice, but also by way of punishment to the wrongdoer. When a stranger to the action approaches a juror, as appears to have been done here, with a request that the jury find for the defendant, a verdict which is sustained by the evidence and the law should not be set aside in the absence of a showing that any party to the action was prejudiced by this improper act. To establish a precedent of this kind would do more harm than good and make it easy to open the way for upsetting proper verdicts by dishonest parties who expect an adverse verdict against them. There is no showing here that the verdict was not proper and justified both by the facts and the law of the case, and there was no exception to the verdict on the ground that it had been brought about by improper influence or misconduct. The plaintiff did not join with the defendants Yamashiro and Haida in moving for the discharge of the jury and the entry of a mistrial but saw fit to stand

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by without objection, speculate on the verdict, accept it if favorable and attack it if unfavorable. Such conduct cannot be encouraged. Under such circumstances the plaintiff must be regarded as having waived the misconduct on the part of a stranger whereby it was sought to influence a juror. It is argued that because the plaintiff did not object to the motion to discharge the jury he must be regarded as having acquiesced therein. We do not so consider it but regard his action as acquiescing in the action of the court in refusing to discharge the jury. If plaintiff had joined with these two defendants in moving for the discharge of the jury the jury would probably have been discharged. If he had desired to take advantage of the attempt to influence the jury he should have done so at the time, and failing to do so then must be regarded as having waived the irregularity. *Spreckels v. Brown*, 212 U. S. 208; *Merricourt v Norwalk Fire Ins. Co.*, 13 Haw. 226; *Bulliner v. People*, 95 Ill. 394. It is proper to deny a motion for a new trial based upon the fact that a stranger who is not shown to have acted by the procurement or with the knowledge or consent of any party to the action approached one of the jurors with the request that a verdict be found for the defendant in the absence of a showing that the verdict rendered was not authorized by the evidence and the law of the case and in the absence of a showing that the jury or any of the jurors were influenced by such request. If the successful party is shown to have tampered with the jury the verdict in his favor should be set aside so as to remove the court's proceedings from the suspicion of undue influence. But to set aside a proper verdict because a stranger has requested a juror to find a certain way would be an injustice not authorized and no punishment to the offender who may and should be proceeded against for contempt of court.

Syllabus.

The exception is overruled.

*J. A. Matthewman* (Thompson & Cathcart on the brief) for plaintiff.

*Lorrin Andrews* (Andrews & Pittman on the brief) for defendants Yamashiro and Haida.

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TERRITORY v. HERMOGOMES ALCANTARA.

No. 1054.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

HON. C. W. ASHFORD, JUDGE.

ARGUED MARCH 19, 1918.

DECIDED MARCH 28, 1918.

COKE, C. J., QUARLES AND KEMP, JJ.

APPEAL AND ERROR—*exceptions*.

A general exception to the entire charge of the court given to the jury does not bring to the attention of this court any specific question of law presented to the lower court and is too general to be considered in the appellate court.

HOMICIDE—*intent*.

In determining the criminality of the act of killing it is immaterial whether the intent was to kill the person killed, or whether the death of such person was the accidental or otherwise unintentional result of the intent to kill someone else.

SAME—*manslaughter—instructions*.

On the trial of a person accused of committing the crime of murder, if there be no evidence upon which the jury can properly find the defendant guilty of an offense of a lesser degree than the one charged it is not error to instruct the jury that it cannot return a verdict of guilty of manslaughter or of any offense less than the one charged.

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~~SAME—same—same.~~

But in a prosecution for murder, where there is some substantial evidence, however weak and inconclusive it may appear to the trial court, that would tend to mitigate the homicide to manslaughter, it is error for the court to refuse to instruct the jury concerning manslaughter. Held, in this case, that such instruction should have been given.

## OPINION OF THE COURT BY COKE, C.J.

The defendant was indicted by the grand jury of the circuit court of the first circuit on August 27, 1917, for the crime of murder in the first degree. The indictment charged the defendant with the killing of one Eustakuia Eljano on the 13th day of August, 1917, in the City and County of Honolulu, Territory of Hawaii. The defendant was tried before the circuit court of the first judicial circuit, Territory of Hawaii, in September 1917 and was convicted by a jury of murder in the first degree, which in this jurisdiction carries with it the death penalty. The defendant now comes to this court on exceptions.

The first exception relied upon by defendant is to the refusal of the trial court to submit to the jury, as requested by defendant, a charge upon manslaughter. The second exception of defendant is a general one to the entire charge of the court to the jury and the third exception is to the court's refusal to grant defendant's motion for a new trial, which, in effect, embodies the two exceptions first above referred to. Defendant's exception No. 2, being directed to the entire charge of the court to the jury, is too general in its terms to warrant consideration by this court. It has been repeatedly held by this court that exceptions, to be good, must be sufficiently definite and specific to direct the attention of this court to a point of law which was



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specifically called to the attention of the trial court affecting the legality of its ruling, thereby giving the lower court an opportunity to correct its ruling if the same was erroneous. See *Fraga v. Portuguese Mutual Benefit Society*, 10 Haw. 128; *Territory v. Puahi*, 18 Haw. 649; *McCandless v. Honolulu Plantation Co.*, 19 Haw. 239; *Ripley & Davis v. Kapiolani Est.*, 22 Haw. 507; *Kennedy v. Sniffen*, 23 Haw. 115. It then remains for us to decide the one question, to wit, whether the trial court erred in refusing to give to the jury the instruction requested by the defendant covering the crime of manslaughter.

The instruction requested was as follows: "I charge you that if you believe from the evidence adduced before you, beyond all reasonable doubts, that the defendant without malice aforethought and without authority, justification or extenuation by law stabbed and killed one Eustakuia Eljano, as alleged in the indictment, then you should find the defendant guilty of manslaughter and in the degree of manslaughter as you may find and arrive at." The court refused to give this instruction as well as all other instructions requested by both the prosecution and defense and then proceeded to give its own instructions which were to the effect that under the evidence the jury should find the defendant guilty of murder either in the first or second degree or should acquit him. The court then proceeded to define the crime of murder and differentiated between murder in the first and second degree. The defendant excepted to the court's refusal to give his instruction on manslaughter, hereinabove set forth, and this exception is now properly before us for consideration.

Murder, under the statutes of this Territory, is the killing of any human being with malice aforethought,

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without authority, justification or extenuation by law and is of two degrees, the first and second, which shall be found by the jury. Sec. 3862 R. L. 1915. Murder committed with deliberate premeditated malice aforethought or in the commission of or attempt to commit any crime punishable with death, or committed with extreme atrocity or cruelty, is murder in the first degree. Murder not appearing to be in the first degree is murder in the second degree. Sec. 3864 R. L. 1915. Whoever kills a human being without malice aforethought, and without authority, justification or extenuation by law, is guilty of the offense of manslaughter. Sec. 3866 R. L. 1915. When the act of killing another is proved malice aforethought shall be presumed and the burden shall rest upon the party who committed the killing to show that it did not exist, or a legal justification or extenuation therefor. Sec. 3863 R. L. 1915. Under an indictment for murder or manslaughter the jury may return a verdict of manslaughter in any degree or for assault and battery, as the facts proved will warrant. Sec. 3825 R. L. 1915.

It will thus be seen that the essential difference between murder and manslaughter is that in the former crime the killing is with malice and in the latter without malice. In other words, malice is the element which distinguishes murder from manslaughter. It is not disputed that Eustakuia Eljano was killed nor is it denied that she was killed by the defendant. A very strong case was made out by the prosecution to the effect that on the day of the killing, to wit, August 13, the defendant followed the deceased and Pedro from Honolulu to Waipahu, a distance of about twenty miles, and located them at the house of one Pastor; that Pedro was asleep inside of a room of the building and that the

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deceased was standing in the doorway of the house conversing with Pastor and his wife; that defendant approached the house and without uttering a word stabbed the deceased with a dagger about twelve inches in length; that the blade of the dagger penetrated the lower lobe of the left lung; that deceased lived until the 18th of August at which time death resulted from the wound inflicted; that defendant then proceeded into the room where Pedro was asleep and stabbed him but the wound inflicted did not result fatally. The only evidence introduced by the defendant was his own testimony. He testified that on the day of the tragedy, believing that deceased had accompanied a man by the name of Pedro in an automobile from Honolulu to the village of Waipahu, he proceeded to that place by train and found the parties at Pastor's house; that arriving at the house he knocked at the door and deceased came and opened the door. Pedro was sitting in the corner of the room; that deceased refused to talk with defendant and that Pedro then approached defendant telling him that he had no business to talk with the deceased and that if he (defendant) did not leave the place Pedro would kill him; that Pedro had a knife and raised his hand ready to stab the defendant; that the defendant took a knife and while he was in the act of stabbing Pedro the deceased ran between them and received a mortal blow which was intended for Pedro. Defendant denies that he intended to stab the deceased but admits that he did intend to stab Pedro. Defendant further testified that he did not intend to do anything wrong but that he stabbed Pedro because Pedro wanted to stab him first.

The foregoing is the only evidence that is at all favorable to the defendant and is the only evidence upon

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which the defendant could ask an instruction covering the crime of manslaughter. The degree of the crime, as a matter of law, is not altered by reason of the fact that the mortal blow descended upon the deceased instead of upon Pedro, at whom it was directed. Where one attempts to commit a premeditated and deliberate murder and as the result of the act kills another than his intended victim he will, in respect of the person killed, be guilty of murder in the first degree if there is a legal connection between the original purpose of the act and the unexpected result. *The King v. Bush*, 1 Haw. 62; *Ringer v. State*, 85 S. W. 410; *People v. Suesser*, 75 Pac. 1093; *State v. Bell*, 62 Atl. 147. In determining the criminality of the act of killing it is immaterial whether the intent was to kill the person killed or whether the death of such person was the accidental or otherwise unintentional result of the intent to kill someone else. *State v. Briggs*, 52 S. E. 218. Leaving aside for the moment the evidence of the prosecution and considering solely the effect of the testimony of the defendant, can it be said that there was no evidence which would have justified the jury in finding the defendant guilty of manslaughter? Can it be said that the jury, had the requested instruction been given, might not have found that the defendant at the time and on account of the assault about to be committed upon him was seized by sudden passion or rage or fear and that he acted without malice? Was it not clearly a question of fact for the jury to determine what was the mental condition of the defendant at the time he committed the homicide? Did not the court transcend its authority when saying, as in effect it did, that in view of the evidence the only verdict the jury could under the law properly render would be either one of guilty of murder

## Opinion of the Court.

in the first or second degree or not guilty? Was not the attitude of the court tantamount to an instruction to the jury to disregard the evidence of the defendant? It is correct to assume that section 3825, R. L. 1915, does not authorize a jury in a criminal case to find the defendant guilty of a lesser offense than the one charged unless the evidence justifies it in so doing. The only object of that section is to enable the jury, in case the defendant is not shown to be guilty of the particular crime charged and if the evidence justifies it to do so, to find him guilty of a lesser offense, as the facts proved would warrant. In this case, had there been an entire absence of evidence upon which to rest a verdict of guilty of manslaughter, undoubtedly the refusal of the court to give the instruction requested would have been correct, but there was not an entire absence of such evidence. The prosecution cites in support of the correctness of the trial court's ruling the decision of this court in *Republic v. Kapea*, 11 Haw. 293. But in that case it was never denied that Dr. Smith was murdered in cold-blood. The defense relied solely upon an attempt to prove an alibi. There was nothing whatever in the record in that case upon which to base an instruction upon manslaughter. The rule is laid down in the case just cited that "On the trial of a person for the offense of murder in the first degree, *where there is no evidence upon which the jury can find the defendant guilty of an offense of a lesser degree than the one charged*, it is not error to charge the jury that if they believed the evidence of the prosecution they should find the defendant guilty of murder in the first degree or not guilty if they disbelieved the evidence." And to the same effect in *Sparf v. United States*, 156 U. S. 51, it is held that "On the trial of a person accused of committing the

## Opinion of the Court.

crime of murder, *if there be no evidence upon which the jury can properly find the defendant guilty of an offense included in or less than the one charged*, it is not error to instruct them that they cannot return a verdict of guilty of manslaughter or of any offense less than the one charged." In *Stevenson v. United States*, 162 U. S. 313, the defendant had been found guilty of murder in the first degree in the United States circuit court for the eastern district of Texas. The deceased was a deputy United States marshal who had gone to a saloon for the purpose of arresting the defendant for threats and disturbances created by him. At least some of the evidence in this case tended to show that the defendant was drinking at a bar and that he was armed with a rifle; that the deceased went to the door of the saloon and fired in the direction of the defendant; that defendant thereupon fired killing the deceased. The defendant was convicted of murder and sentenced to be hanged. After the evidence was in the defendant requested the trial court to submit to the jury a charge upon manslaughter. Upon the refusal of the court to so instruct the jury the case went to the Supreme Court of the United States. In passing upon this matter the Supreme Court said:

"The question is whether the court erred in refusing this request. The evidence as to manslaughter need not be uncontradicted or in any way conclusive upon the question; *so long as there is some evidence upon the subject, the proper weight to be given it is for the jury to determine*. If there were any evidence which tended to show such a state of facts as might bring the crime within the grade of manslaughter, it then became a proper question for the jury to say whether it showed that the crime was manslaughter instead of murder. It is difficult to think of a case of killing by shooting, where both men were armed and both in readiness to shoot, and where both did shoot, that the question would

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not arise for the jury to answer, whether the killing was murder or manslaughter, or a pure act of self defense. The evidence might appear to the court to be simply overwhelming to show that the killing was in fact murder, and not manslaughter or an act performed in self defense, and yet, so long as there was some evidence relevant to the issue of manslaughter, the credibility and force of such evidence must be for the jury, and cannot be matter of law for the decision of the court. \* \* \*

"The ruling of the learned judge was to the effect that, in this case, the killing was either murder, or else it was done in the course of self defense, and that under no view which could possibly be taken of the evidence would the jury be at liberty to find the defendant guilty of manslaughter. The court passed upon the strength, credibility and tendency of the evidence, and decided as a matter of law what it seems to us would generally be regarded as a question of fact, viz., whether under all the circumstances which the jury might, from the evidence, find existed in the case, the defendant was guilty of murder, or whether he killed the deceased, not in self defense, but unlawfully and unjustly, although without malice. The presence or absence of malice would be the material consideration in the case, provided the jury should reject the theory of self defense, and yet this question of fact is, under the evidence in the case, determined by the trial court as one of law and against the defendant. \* \* \*

"The ruling of the trial judge in effect was to say that as matter of law there was nothing in all this evidence, if true, which would permit the jury to find that the plaintiff in error when he fired his rifle was so much under the influence of sudden passion, caused by these circumstances and by this assault upon him, as not to have been actuated by that malice which the law defines as a necessary ingredient in the crime of murder. Is it perfectly plain and clear, as a conclusion of law, that shooting at another under circumstances such as were detailed by some of the witnesses in this case can have



## Opinion of the Court.

no tendency to raise within the mind of the person thus assaulted such a sudden passion of anger or terror as to deprive his subsequent act of that malice which is necessary to make it murder? If it is not to be so asserted as matter of law, then it becomes a question of fact in such case, and that question must be answered by the jury. Whether the witnesses told the truth in regard to such circumstances is not for the court to say, nor is it for the court to decide upon the weight to be given to them if proper for the consideration of the jury.

“It is objected that while the evidence above set forth was proper to be submitted to the jury upon the issue of self defense, it was not of that character to even raise an issue as to the grade of the crime, if the theory of self defense were not sustained. We do not see the force of the objection. The fact that the evidence might raise an issue as to whether any crime at all was committed is not in the least inconsistent with a claim that it also raised an issue as to whether or not the plaintiff in error was guilty of manslaughter instead of murder. It might be argued to the jury, under both aspects, as an act of self defense and also as one resulting from a sudden passion and without malice. The jury might reject the theory of self defense, as they might say the shot from the pistol of the deceased had already been fired and the plaintiff in error had not been harmed, and, therefore, firing back was unnecessary and was not an act of self defense. But why should the other issue be taken from the jury and they not be permitted to pass upon it as upon a question of fact? \* \* \*

“A judge may be entirely satisfied from the whole evidence in the case that the person doing the killing was actuated by malice; that he was not in any such passion as to lower the grade of the crime from murder to manslaughter by reason of any absence of malice; and yet if there be any evidence fairly tending to bear upon the issue of manslaughter, it is the province of the jury to determine from all the evidence what the condition of mind was, and to say whether the crime was murder



## Opinion of the Court.

or manslaughter." See also *Brown v. United States*, 159 U. S. 100.

In the case at bar was it not for the jury in the first place to decide upon the credibility of the evidence given by all of the witnesses, including the defendant in this case, and in passing upon this evidence was it not exclusively within the province of the jury to determine whether, if the facts were as testified to by the defendant, that under all the circumstances the defendant was actuated by malice or whether controlled by sudden passion or rage or fear, the assault which resulted in the death of the deceased was without malice? The supreme court of Michigan, speaking by Chief Justice Cooley, in setting aside a verdict of murder in a case in which the homicide was admitted and the only question was whether it was murder or manslaughter, said:

"The trial of criminal cases is by a jury of the country, and not by the courts. The jurors, and they alone, are to judge of the facts, and weigh the evidence. The law has established this tribunal because it is believed that, from its numbers, the mode of their selection, and the fact that the jurors come from all classes of society, they are better calculated to judge of motives, weigh probabilities, and take what may be called a common sense view of a set of circumstances, involving both act and intent, than any single man, however pure, wise and eminent he may be. This is the theory of the law; and as applied to criminal accusations, it is eminently wise, and favorable alike to liberty and justice. But to give it full effect the jury must be left to weigh the evidence, and to examine the alleged motives by their own tests. They cannot properly be furnished for this purpose with balances which leave them no discretion, but which, under certain circumstances, will compel them to find a malicious intent when they cannot conscientiously so believe such an intent to exist." *People v. Garbutt*, 17 Mich. 9, 27.

## Opinion of the Court.

In an early English case Mr. Justice Best said: "If there was any evidence, it was my duty to leave it to the jury, who alone could judge of its weight. The rule that governs a judge as to evidence applies equally to the case offered on the part of the defendant, and that in support of the prosecution. It will hardly be contended, that if there was evidence offered on the part of the defendant, a judge would have a right to take on himself to decide on the effect of the evidence, and to withdraw it from the jury. Were a judge so to act, he might, with great justice, be charged with usurping the privileges of the jury, and making a criminal trial, not what it is by our law, a trial by jury, but a trial by the judge." *The King v. Burdett*, 3 B. & Ald. 717, and 4 B. & Ald. 95.

In *State v. Buffington*, 72 Pac. 213, the evidence of the defendant, in brief, was that the deceased, following a verbal altercation with defendant, jerked a chair from under defendant precipitating him onto the floor; the deceased stood over the defendant with the chair; defendant grabbed a revolver which happened to be within arm's reach and fired twice killing the deceased. The trial court in that case instructed the jury that they should find the defendant guilty of murder in the second degree if they found that the elements of the offense had been proven to their satisfaction, but if they did not so find then they should acquit the defendant, and refused to instruct upon the crime of manslaughter. This refusal on the part of the trial court was the basis of an appeal to the supreme court. The supreme court of Kansas, after remarking that many of the statements of the defendant were contradicted by other witnesses, concludes in the following language:

"The defendant in a criminal prosecution has the right to have the court instruct the jury in the law applicable to his contention, if supported by substantial evidence, however weak, unsatisfactory or inconclusive it may appear to the court. To refuse to so instruct the jury would

## Opinion of the Court.

be to invade its province in the trial of a case. The question is not whether, in the mind of the court, the evidence as a whole excludes the idea that the defendant is guilty of an inferior degree of the offense charged, but whether there is any substantial evidence tending to prove an inferior degree of the offense. If there is, then the question of such degree should be submitted to, and left for the determination of, the jury. *The unsupported testimony of the defendant alone, if tending to establish such inferior degree, is sufficient to require the court to so instruct.*"

And so in this case, while the testimony of the defendant may have appeared to be weak and unsatisfactory and it may have been overwhelmed by the testimony of the witnesses for the prosecution yet the defendant's testimony raised an issue of fact, to wit, whether the killing was with or without malice and this issue should have been submitted by the court to the jury under an instruction upon manslaughter. The defendant had the right to the judgment of the jury upon the facts uninfluenced by any direction from the court as to the weight of the evidence. See *Hopt v. Utah*, 110 U. S. 574. The fact that the jury found the defendant guilty of murder in the first degree, while under the instructions given by the court it might have found him guilty of murder in the second degree, tends to refute the likelihood that had the instruction requested been given the jury would have found any different verdict than it did. But this at best is a mere matter of conjecture and having found that the court should have given the instruction covering manslaughter it is not for us to speculate upon the effect the refusal of the court to give the instruction might have had upon the jury.

The exception is sustained and the cause is remanded to the circuit court for a new trial.

C. S. Davis, Second Deputy City & County Attorney

## Syllabus.

(A. M. Brown, City & County Attorney with him on the brief), for the Territory.

N. W. Aluli for defendant.

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YIM FAT *v.* PATRICK GLEASON.

No. 1067.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

HON. C. W. ASHFORD, JUDGE.

SUBMITTED MARCH 25, 1918.

DECIDED MARCH 28, 1918.

COKE, C. J., QUARLES AND KEMP, JJ.

APPEAL AND ERROR—*exceptions—specific question.*

The purpose of an exception is to bring to the appellate court a specific question of law upon which the trial court has erroneously ruled to the prejudice of the party excepting.

SAME—*same—rejected evidence—record.*

The appellate court will not consider an exception to the action of the trial court in sustaining an objection to a question asked a witness when the record does not disclose any offer to show what the answer will be and that the answer would be material and competent evidence.

OPINION OF THE COURT BY QUARLES, J.

This, an action of replevin to recover seven pigs, was commenced by the plaintiff in the district court of Honolulu, wherein a judgment in favor of the defendant was entered, from which the plaintiff appealed to the circuit court, where the cause was tried by a jury and a verdict and judgment in favor of the plaintiff for restitution, or if

## Opinion of the Court.

restitution cannot be had for the value of the property in the sum of \$133.10, from which the defendant comes to this court on exceptions. All of the exceptions have been waived by the defendant except the fifth one, which is as follows:

"Exception 5. That upon the direct examination of Patrick Gleason, a witness called and sworn on behalf of defendant, the following question was propounded to said witness, to wit:

"Mr. Lightfoot: Did you have any talk with Mrs. Choy Duck about the ownership of these pigs on the second occasion, in the presence of Yim Fat?

"Mr. Irwin: Objected to upon the ground it is incompetent, irrelevant, and immaterial.

"The Court: Sustained.

"Mr. Lightfoot: Save an exception."

This exception must be denied. The purpose of an exception is to bring to the appellate court a specific question of law which the trial court erroneously ruled to the prejudice of the party excepting (*Ripley & Davis v. Kapio-lani Estate*, 22 Haw. 507). The record does not show that the defendant was prejudiced by the court's refusal to permit the question to be answered. The answer might have been in the negative. The defendant did not offer to show what the witness would answer, and we cannot presume that the answer would have been material or in favor of the defendant, in the face of the objection made and in the absence of a showing as to what the answer would be. "Alleged error in the exclusion of evidence will not be considered, unless the record preserves such evidence for the consideration of the reviewing court, either literally or in substance, and shows that it was offered, and excluded; for what purpose it was offered; that it was material and relevant; the grounds urged against its admission; the grounds of objection to its exclusion, and the grounds upon

## Syllabus.

which it was excluded. And if the existence of particular facts is necessary to the competency of the evidence offered, these must also be shown. But in some jurisdictions it is held that the grounds of objection are immaterial because the action of the trial court is presumed to have been right, the contrary not appearing" (4 C. J. p. 71, sec. 1661). This court will not consider an exception to the action of the trial court in sustaining an objection to a question asked a witness when the record does not disclose any offer to show what the answer will be and that the answer would be material and competent evidence.

Exception overruled.

*Harry Irwin and F. Schnack* for plaintiff.

*Lightfoot & Lightfoot* for defendant.

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HAWAIIAN TRUST COMPANY, LIMITED, TRUSTEE  
UNDER THE WILL AND OF THE ESTATE OF  
ROBERT W. HOLT, DECEASED, *v.* ROSALIA KA-  
HALAOAKA HOLT, JAMES LAWRENCE HOLT,  
ROBERT HOLT, GEORGE H. HOLT, JOHN DOE,  
RICHARD ROE AND ROBERT W. HOLT.

No. 1064.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.  
HON. C. W. ASHFORD, JUDGE.

SUBMITTED APRIL 1, 1918.

DECIDED APRIL 3, 1918.

COKE, C. J., QUARLES AND KEMP, JJ.

APPEAL AND ERROR.

A party to a suit cannot appeal from a decree therein rendered if he is not thereby affected.

## Opinion of the Court.

## OPINION OF THE COURT BY COKE, C. J.

This cause comes up on the appeal of Robert W. Holt from the decree entered in the above entitled cause. The petitioner, the Hawaiian Trust Company, Limited, trustee under the will and of the estate of Robert W. Holt, deceased, presented a petition in the lower court to have determined the heirs at law of James Robinson Holt, deceased. The will of Robert W. Holt, father of James Robinson Holt, contains the following clause: "Fourth. I give, devise and bequeath to my son James Robinson Holt one-quarter of all my estate, both real and personal, the income of the same to be paid to him by my executor hereinafter named for his use and support for the term of his natural life, and after the death of my said son I give, devise and bequeath the said one quarter to the heirs of said James R. Holt and their assigns." The petition recites that James Robinson Holt died at Honolulu, Hawaii, on or about the 18th day of April, 1916; that respondent Rosalia Kahalaoaka Holt is the widow of said James Robinson Holt, deceased; that respondent Robert Holt of Kalaupapa, Molokai, claims to be a son of said James Robinson Holt; that respondent James Lawrence Holt of Honolulu claims to be an adopted son of said James Robinson Holt; and that certain persons unknown to petitioner, fictitiously named John Doe and Richard Roe, represent the other claimants of any interest in said estate. Petitioner further represents that it has in its possession certain property belonging to the estate and prays for an order determining who are the heirs at law of said James Robinson Holt, deceased, in order that a proper distribution of the property of said estate may be made. The record shows that James Robinson Holt and Margaret Kia were married in April, 1859, and that the respondent Robert Holt was the issue of this marriage; that respondent

*Opinion of the Court.*

James Lawrence Holt was born in 1870 and is the son of James Robinson Holt and the respondent Rosalia Kahalaoaka Holt; that James Robinson Holt was divorced from his wife Margaret Kia Holt on November 26, 1898, and that on the same day he was married to respondent Rosalia Kahalaoaka Holt, mother of the respondent James Lawrence Holt. The appellant Robert W. Holt filed an answer herein denying that respondent James Lawrence Holt is an heir at law of James Robinson Holt, deceased, and alleging that respondent Robert Holt is not the lawful child of James Robinson Holt, deceased; further setting forth in his answer that the appellant is a nephew of James Robinson Holt, deceased, and as such is entitled to one-eighteenth of the property of the estate. He offered no evidence in support of these averments. Indeed there is no evidence in the record to show that the appellant was related at all to James Robinson Holt, deceased. The evidence discloses that the respondent Robert Holt is the son of James Robinson Holt and Margaret Kia Holt born in wedlock. The record further shows that both respondent Robert Holt and respondent James Lawrence Holt by sundry mesne conveyances transferred their interests in the estate to the respondent Rosalia Kahalaoaka Holt, the widow of James Robinson Holt, deceased. After a somewhat protracted hearing the court below entered a decree to the effect that Robert Holt and James Lawrence Holt are the sons and the only heirs of James Robinson Holt, deceased, and as such inherited the property designated in the fourth paragraph of the will of Robert W. Holt, deceased. The court further found that both respondents Robert Holt and James Lawrence Holt had conveyed their interests in the property in question to respondent Rosalia Kahalaoaka Holt and decreed that the same be distributed to her.



## Opinion of the Court.

The burden of the appellant's grievance seems to be based upon his contention that the court below erred in holding that under the provisions of Section 2996, R. L. 1915, respondent James Lawrence Holt was legitimized and thereby became an heir of his father James Robinson Holt, deceased. We are disinclined to pass upon this purely academic question of law when our opinion, whatever it might be, could not possibly affect the conclusions to be arrived at. The evidence herein clearly shows that respondent Robert Holt is a lawful son and heir of James Robinson Holt, deceased, and as such, upon the death of his father, either inherited the property in question jointly with James Lawrence Holt, if the latter was a lawful heir of his father, or exclusively if he was not an heir. But in neither event could the appellant be affected even were he a nephew of James Robinson Holt. The appellant has failed to show any interest whatsoever in the property involved in this cause and no rights of his are affected by the decree, and whether the same is correct or not he cannot complain. A party to a suit cannot appeal from a decree therein rendered if he is not thereby affected. *Farmers' Loan & Trust Co. v. Waterman*, 106 U. S. 265. See also *Takahashi v. W. Kualu*, 17 Haw. 87.

The decree appealed from is affirmed.

No appearance for petitioner.

*Lightfoot & Lightfoot* for appellant.

*Castle & Withington, E. A. C. Long* and *Marguerite K. Ashford* for respondents *Rosalia K. Holt* and *James L. Holt*.

## Syllabus.

JOSE V. MACIEL *v.* JOHN W. KALUA.

No. 1074.

EXCEPTIONS FROM CIRCUIT COURT, SECOND CIRCUIT.

HON. W. S. EDINGS, JUDGE.

SUBMITTED MARCH 22, 1918.

DECIDED APRIL 4, 1918.

COKE, C. J., QUARLES AND KEMP, JJ.

LIMITATION OF ACTIONS—*part payment as evidence of new promise.*

In an action on a promissory note which on its face was barred by the statute of limitations, there appeared an endorsement showing that \$450 had been paid by the check of a stranger to the note and no showing was made that he was requested by either of the makers of the note to make the payment or that he was their agent authorized for that purpose, held: That in order for this payment to have the effect of a new promise it was incumbent upon the plaintiff to show that the one making the payment did so at the request of the debtor or that he was the agent of the debtor fully authorized for that purpose.

SAME—*new promise—time when made must be shown.*

The plaintiff having shown by the note itself that more than six years elapsed between the date on which the note matured and the commencement of action thereon where he relies upon a new promise to take the case out of the statute, the new promise must be shown to have been made within six years of the commencement of the action, otherwise the new promise will itself be barred.

SAME—*same—evidence of new promise.*

Where the debtor stated to the creditor in effect, I am fighting the case against the estate and expect to win out; and then I expect to pay you in full, held: This is not an unconditional promise to pay and is not sufficient to take the case out of the statute.

## OPINION OF THE COURT BY KEMP, J.

This is an action on a promissory note. The note in question bears date July 10, 1908, and was executed by

## Opinion of the Court.

Polly Kalua and John W. Kalua. The record shows that Polly Kalua is dead and that the Hawaiian Trust Company is the executor of her estate. The suit is against John W. Kalua as sole defendant, and was commenced July 7, 1917.

The defense was the statute of limitations. The case was tried jury waived, and resulted in a judgment for the plaintiff for the amount claimed. The defendant offered no evidence.

The case is presented to this court on exceptions taken at the trial and to the written decision by the court, said exceptions being as follows:

## "Exception No. 1.

"That after the introduction of all of the evidence on the part of the plaintiff, the plaintiff having rested, the defendant moved for judgment against the plaintiff and in favor of defendant on the grounds, to wit:

"First: That the claim of plaintiff is barred by the statute of limitations in that there is no evidence tending to show that defendant, John W. Kalua, ever acknowledged the existence of the debt set forth in the complaint, or voluntarily made any payment thereon, or promised to pay the same after the execution of the instrument.

"Second: That there is no evidence tending to show that W. R. Castle was ever the agent of defendant, or that said W. R. Castle had any authority whatever to act for the defendant herein.

"Third: That there is a variance between the allegations and the proof in that the action is based on a promise of defendant, and the proof discloses an alleged transaction between the plaintiff and some other party, the name not having been disclosed.

"Fourth: That it appears from the evidence that Polly Kalua is the joint and several maker of the note and that the Hawaiian Trust Company has not joined in this action as party defendant.

"The court disallowed and overruled the said motion, to

## Opinion of the Court.

which said ruling of the court defendant duly excepted (Trans. p. 5).

## "Exception No. 2.

"That thereafter, on the 15th day of January, 1918, the court filed a written decision in the above entitled cause in favor of the plaintiff herein and against the defendant herein in the sum of \$1,979.50 together with interest, costs and attorneys' commissions, to which said decision defendant filed a written exception on the ground that said decision was contrary to law, the evidence and the weight of evidence, and on the further ground that said decision is not in compliance with Section 2380 of the Revised Laws of Hawaii."

The first and second grounds of exception No. 1 raise similar questions and will be considered together.

It cannot be questioned that plaintiff, having shown by the note itself that more than six years elapsed between the date on which the note matured and the date on which his action was commenced, must go further and show facts which would take the cause out of the statute.

The facts on which the plaintiff relies as having tolled the statute are as follows:

1. A payment of four hundred fifty (\$450) dollars on the note, made July 17, 1911, being interest thereon to July 10, 1911. This payment is endorsed on the note in the following words and figures:

"July 17, 1911, rec'd on within note, by check of W. R. Castle, by D. H. Case, his Atty. in fact, four hundred & fifty dollars, being three years' int. to July 10, 1911. J. V. Maciel"

The plaintiff, the only witness sworn in the case, testified that there had been \$450 paid on the note on the date shown by the endorsement on the note. He made no statement in his evidence as to who made the payment. On cross-examination he stated that neither Polly Kalua nor

## Opinion of the Court.

John W. Kalua gave him the \$450. Nothing further was shown as to who paid the \$450 or the circumstances under which it was paid.

2. A new promise by the defendant, the evidence of which also comes from the plaintiff and is as follows:

“Q. Ever made demand on Kalua for the amount due?  
A. Yes. He told me he was fighting the suit against the estate which he expected to win out and then he expect to pay me in full.”

There is no other evidence disclosed by the record bearing on this question, the record being silent as to when this statement of the defendant was made.

The question to be determined is whether either the payment of interest under the circumstances as related or the statement of the defendant as set out above is sufficient to take the case out of the bar of the statute. If either one is sufficient the judgment is correct. On the other hand, if neither one was sufficient the judgment of the court is manifestly erroneous and must be reversed.

First as to the payment of the \$450. In Angell on Limitations, 6th ed., sec. 240, and the note thereunder it is said:

“An acknowledgment or new promise may be inferred from the fact of part payment of a contract within six years, or from the payment of a smaller, on account of the greater, sum of money due from the party making the payment to the party to whom it is made.” “But part payment is only *prima facie* evidence and may be rebutted by other evidence and by the circumstances under which it is made \* \* \* and the court cannot imply a promise from the mere fact of part payment, as an inference of law. It must be left to the jury.”

In the case at bar the showing is that the payment was not made by the party from whom it was due, but from the endorsement on the note it is at least to be inferred

## Opinion of the Court.

that the payment was made by W. R. Castle and he is not shown to have had any liability whatever on the note sued on.

In the case of *Ahlo v. Tai Lung*, 9 Haw. 272, the court gave the jury the following instruction:

"That payments on account of plaintiff's note \* \* \* made without defendant's authority are not evidence of a new promise on the part of defendant and will not take the note out of the operation of the statute of limitations."

The charge was excepted to and on appeal the court held the charge to correctly state the law.

"The ground upon which a part payment is held to take the case out of the statute is that such payment is a voluntary admission by the debtor that the debt is then due, which raises a new promise by implication to pay it or the balance. To have this effect it must be such an acknowledgment as reasonably leads to the inference that the debtor intended to renew his promise of payment." (*Campbell v. Baldwin*, 130 Mass. 200; *Ahlo v. Tai Lung*, *supra*.)

In *Stoddard v. Doane*, 7 Gray 387, it is said: "To have this effect (of a new promise) it is manifest that the payment must be made by the debtor or by his order or by an agent fully authorized for the purpose." See also *Miller v. Magee*, 2 N. Y. Supp. 156; *Littlefield v. Littlefield*, 91 N. Y. 203, and *Ahlo v. Tai Lung*, *supra*.

Counsel has referred us to one case in which it is said that payment is certain to be made only by those who have some duty or interest to pay (*Lewin v. Wilson*, II App. Cas. 645). This might have had some application if the showing had merely been that a payment was made on the note and the date of the payment, but here the plaintiff's own evidence goes further and shows that the payment was not made by either of the persons liable for the payment of the note and inferentially at least that the

## Opinion of the Court.

payment was made by W. R. Castle, a stranger to the transaction.

Under the circumstances we are of the opinion, and hold, that in order to have the effect of a new promise, the payment having been made by a stranger to the transaction, it was incumbent upon the plaintiff to show that the one making the payment did so at the request of the debtor or that he was the agent of the debtor fully authorized for that purpose. This he has wholly failed to do and his showing of part payment is therefore not sufficient to take the case out of the statute of limitations.

The evidence of the new promise relied on by plaintiff and set out above is absolutely lacking in one essential feature. It fails to show when the alleged new promise was made and therefore fails to show that it was made within six years of the commencement of this action.

The effect of a new promise is merely to revive the remedy upon the original obligation or to start the statute anew; in short, to destroy the effect of the statute up to that time. It does not stop the running of the statute, like the institution of a suit, but fixes a new date as the point from which the period of limitation is to be reckoned. (19 Amer. & Eng. Enc. of Law, 2 ed. 290; *Emerson v. Mills*, 83 Tex. 385; *Bayliss v. Street*, 51 Ia. 627; *Copeland v. Collins*, 122 N. C. 619; *Ireland v. Mackintosh*, 61 Pac. (Utah) 901.)

The new promise having the effect of fixing a new date as the point from which the period of limitation is to be reckoned it is apparent that the new promise must be shown to have been made within six years of the commencement of the action otherwise the new promise will itself be barred.

The note in question matured on July 10, 1910. It may very well be that the alleged new promise of the defendant was made at or about that time. If it was made any time

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before July 7, 1911, it, like the original promise, was barred under the provisions of the statute and the plaintiff has been content to let the record remain silent on this important question.

In view of our conclusion as to the insufficiency of plaintiff's showing as to when the alleged new promise was made it is probably unnecessary for us to discuss the question of whether the language used by the defendant as shown by plaintiff's evidence is sufficient to constitute a new promise, but in view of a probable new trial of this case we will give our views.

In the case of *Harris v. Clark*, 18 Haw. 569, at page 573 the court said:

"The United States supreme court, however, at an early date took a decided stand in favor of giving full effect to the prohibition of the statute. In 1832, referring to a still earlier case, the court said:

" 'This court in the case of *Clementson v. Williams*, 8 Cranch 72, nearly twenty years since, expressed a very decided opinion, that courts had gone quite far enough in admitting acknowledgments and confessions to bar the operation of the statute of limitations, and that this court was not inclined to extend them; that the statute was entitled to the same respect as other statutes, and ought not to be explained away. And from the course of decisions in the state courts, as well as in England, such seems to have been the general impression; and they have been gradually returning to a construction more in accordance with the letter, as well as the spirit and intention of the statute.' *Moore v. Bank of Columbia*, 6 Pet. 86, 92.

"In the case of *Bell v. Morrison*, 1 Pet. 351, 361, Mr. Justice Story laid down the rule which has become the accepted standard in the federal courts and has been widely cited and adopted elsewhere:

" 'If the bar of the statute is sought to be removed by the proof of a new promise, that promise, as a new cause of action, ought to be proved in a clear and explicit man-



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ner, and be, in its terms, unequivocal and determinate and if any conditions are annexed, they ought to be shown to be performed. If there be no express promise, but a promise is to be raised by implication of law, from the acknowledgment of the party, such acknowledgment ought to contain an unqualified and direct admission of a previous, subsisting debt, which the party is liable, and willing, to pay. If there be accompanying circumstances, which repel the presumption of a promise or intention to pay; if the expressions be equivocal, vague and indeterminate, leading to no certain conclusion, but at best to probable inferences, which may affect different minds in different ways; we think they ought not to go to a jury as evidence of a new promise, to revive the cause of action.'

"See also *Wetzell v. Bussard*, 11 Wheat. 309; *Shepherd v. Thompson*, 122 U. S. 231. From these cases it seems to be established that, in order to remove the bar of the statute, there must be, in addition to an admission of a subsisting debt, either an express promise to pay, or circumstances from which an implied promise may be presumed, which must be clear and definite and not conditional nor by way of compromise or attempt at settlement."

In this case the defendant in effect said, I am fighting the case against the estate and expect to win out. If I do then I expect to pay you in full. Can it be said that this is an unconditional promise to pay? We think not.

In our opinion the evidence is not sufficient to show a new promise within the principles stated.

Defendant has abandoned the fourth ground of his exception No. 1 and we deem it unnecessary for us to consider the remaining ground of exception No. 1 or to consider his exception No. 2.

For the errors pointed out the exceptions discussed are sustained and the cause remanded for a new trial.

*D. H. Case* for plaintiff.

*E. Vincent* for defendant.

## Syllabus.

CATHERINE MACHADO *v.* T. MITAMURA.

No. 1057

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

HON. S. B. KEMP, JUDGE.

ARGUED APRIL 1, 1918.

DECIDED APRIL 10, 1918.

COKE, C. J., QUARLES, J., AND CIRCUIT JUDGE HEEN  
IN PLACE OF KEMP, J., DISQUALIFIED.

NEW TRIAL—*nonsuit—directed verdict.*

In an action to recover damages by reason of alleged negligence the evidence was conflicting to the extent that the jury would have been authorized to have found a verdict for either party motion for nonsuit and a motion for an instructed verdict were both properly denied, and a motion for a new trial should have been denied.

SAME—*excessive damages.*

A motion for a new trial on the ground that the verdict for \$1000 damages is excessive is properly denied under the facts which the evidence in this case tends to prove, there being no showing or circumstance disclosed by the record to the effect that the verdict of the jury was the result of passion or prejudice.

## OPINION OF THE COURT BY QUARLES, J.

The plaintiff, a woman of twenty, commenced this action against the defendant, a regular practicing physician, to recover damages claimed to have been sustained by plaintiff by reason of the negligence of the defendant in treating her in a case of childbirth. The trial in the circuit court resulted in a verdict for \$1,000 in favor of the plaintiff. The defendant then moved for a new trial upon a number of grounds, the first being that the court erred in denying defendant's motion for a nonsuit, the second, third, fourth,

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fifth and sixth grounds being alleged errors of the court in giving instructions to the jury, and the seventh being upon the ground that the court erred in refusing defendant's request to instruct the jury to find for the defendant. This motion for a new trial was granted by the trial court, but the record does not disclose upon what ground it was granted. The cause comes before us upon interlocutory exceptions allowed by the trial court, one to the decision of the trial court upon the motion for a new trial, and the other to the order granting a new trial. The consideration of these exceptions requires us to review the evidence, the instructions and the motion for a new trial.

We have carefully examined the instructions complained of and find no reversible error therein and do not think that it would be of any benefit to discuss the said instructions given.

A solution of the question raised by the motion for a nonsuit and the request for an instruction to find for the defendant make it necessary for us to carefully examine the evidence and from it we find that there is testimony from which the jury was authorized to find the following facts: The defendant, a regularly licensed physician and surgeon, was, without previous notice, called at 1 o'clock a. m. January 14, 1917, to attend plaintiff, then laboring in childbirth. Defendant, after an examination, made two injections of pituitrin in plaintiff's side, there being quite an interval between the two injections, after which he waited for something like an hour without results. The defendant then attempted to remove the fetus with forceps. There is evidence tending to show that the defendant used great force in his efforts persisting until he was exhausted, when he had a woman nurse who was with him pull with the instruments until she was also exhausted, when defendant again used the instruments until again exhausted; that

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while pulling with the instruments defendant was sometimes sitting and sometimes standing pulling with force sufficient to swing plaintiff's body from one side to another and up and down; that about 4:30 a. m. the defendant and his assistant left and went home defendant stating that he was tired and needed rest and that they would return later about 8 or 9 o'clock that morning; that somewhere between 8 and 9 o'clock the defendant and his attendant nurse returned and the same operations were continued until the child, still-born, was delivered, which was about 1 o'clock p. m.; that the defendant, his attendant nurse and the chauffeur with defendant took turns about in pulling at the instruments. After the delivery and the removal of the after-birth a rupture or tear in the perineum was discovered which the defendant sewed, some of the witnesses say, with two, others with four, stitches, and defendant had the attendant nurse properly place a pad saturated with some antiseptic. The defendant testifies that he returned that afternoon but three witnesses for the plaintiff testify that he did not return that afternoon but did return on the following day with his attendant nurse and that the nurse replaced the pad with a new one, after which the defendant never visited plaintiff again, but his attendant nurse returned daily for four days, and that she on the fourth day, against the protest of plaintiff and her husband, removed the stitches which had been made to close the tear in the perineum, the nurse saying at the time that defendant had directed her to do so, after which neither she nor the defendant returned to attend the plaintiff. About January 26, plaintiff's husband testifies that he visited defendant and told him that his wife was suffering—that she was worse—and requested him to attend her but he did not do so, but gave witness some powder to mix with water and give to plaintiff. On January 27, the

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plaintiff growing worse, her husband called Dr. Hayes, a practicing physician, to attend plaintiff. Dr. Hayes testifies that he found her with a high temperature, 105 degrees fahrenheit; that the rupture or tear in the perineum was open and infected; that he treated plaintiff thereafter until the 26th of February, when plaintiff was out of danger; that plaintiff was in bed during all of that time. The evidence shows that plaintiff was confined to her bed for about two months and was weak and unable to perform her usual household labor from then until the trial in June following.

As to whether the defendant used proper care in looking after plaintiff and followed the proper practice in doing so the evidence is conflicting. Some of the expert witnesses testify that the patient in a case of this kind should be attended frequently, in a normal case for eight or ten days, while in a case like that of plaintiff, she should be attended by the physician until she attains a normal condition. Others testify that the course pursued by the defendant was proper practice, but some of these experts so testifying state that if called before-hand to attend a case of childbirth they would look after the woman several days before delivery and for eight or ten days thereafter. Expert witnesses introduced by the defendant also testify that in a case of this kind, where the physician is notified at any time that the patient's condition is unfavorable or that she is suffering, it is the duty of the attending physician to immediately attend her. Evidence on behalf of plaintiff shows that her husband went to the office of defendant on January 26, twelve days after the delivery, and told him that plaintiff was getting worse and asked him to go to her and that defendant said there was "no pilikia" and gave him a powder to mix with water and give to his wife to drink. This was denied by the defendant who

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stated that plaintiff's husband did come to see him on the 26th but said that she was getting along all right but had a bad cold and he wanted some cough medicine for her which defendant gave him to take to plaintiff. On this particular phase of the case the defendant's attendant nurse corroborated the defendant by testifying that plaintiff's husband came on January 26 and asked the defendant for cough medicine, but on cross-examination she admitted that she did not understand English and only knew what had been said by what defendant had told her, and on motion her evidence on this point was stricken out. The jury probably concluded that the contention of the plaintiff on this particular point was correct and corroborated by the circumstance that on the following day, the 27th, the plaintiff suffering and having a high fever, her husband called in another physician to attend her. The evidence as we view it was so conflicting that the jury could have found a verdict for either party.

The ground for a new trial that the verdict is excessive we consider without merit. The plaintiff is shown to have suffered a great deal and to have lost time and earning capacity and if entitled to damages at all the amount awarded by the jury does not appear to be excessive, and from an examination of the record it does not appear to us that the amount of damages awarded was the result of passion or prejudice on the part of the jury.

The two grounds for a new trial mentioned in the motion, that the court improperly admitted immaterial evidence, failing to point out the evidence claimed to have been improperly admitted are too general to require consideration.

From statements made by counsel during the argument in this court it appears that the trial court concluded that the allegations of the complaint were not sufficient to ad-

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mit evidence that defendant was guilty of negligence in not visiting plaintiff and attending her after January 15, but the record does not so show nor does it show that this question was raised at all in the trial court. If we should go out of the record to decide this question, which we are not authorized to do, we could very well say that the record shows that the case was tried on the theory that the defendant neglected the case after January 15; that both parties introduced evidence, the one to sustain this theory, the other to refute it; and that it is too late after verdict to raise this question; that if it was necessary to allege the fact specifically, which we do not decide, the omission was cured by the actions of the respective parties by introducing evidence and by the verdict (*County of Hawaii v. Purdy*, 22 Haw. 272, 286).

The evidence being conflicting and the record showing evidence sufficient to authorize the verdict the exceptions to the decision of the trial court on the motion for a new trial and to the order granting a new trial are sustained.

*Lorrin Andrews* (*Andrews & Pittman* on the brief) for plaintiff.

*J. Lightfoot* and *R. A. Vitousek* (*Thompson & Cathcart* and *Lightfoot & Lightfoot* on the brief) for defendant.

## Syllabus.

NINA BERTELMANN, CHRIS K. MOSSMAN, A  
MINOR, AND ANGELINE K. HOGAN *v.* JOSEPH  
K. COCKETT AND HELEN M. COCKETT.

No. 1051.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.  
HON. C. W. ASHFORD, JUDGE.

ARGUED MARCH 22, 1918.

DECIDED APRIL 10, 1918.

COKE, C. J., QUARLES AND KEMP, JJ.

**EQUITY—*mistake—jurisdiction.***

A court of equity has jurisdiction to correct mistakes in a trust deed testamentary in character when the mistake is apparent on the face of the instrument or may be made out by a due construction of its terms.

**SAME—*voluntary trust deeds testamentary in character—rule governing courts in correcting mistake.***

The instrument which the court is asked to correct and construe being voluntary and testamentary in character the law applicable to wills in like cases applies here.

**SAME—*same—bill held not to be sufficient to show mistake.***

No mistake being apparent on the face of the instrument and none that can be made out by a due construction of its terms the bill does not state a case for relief in equity on the ground of mistake.

OPINION OF THE COURT BY KEMP, J.

This is an interlocutory appeal by the defendants from an order overruling their demurrer to plaintiff's bill.

The complaint was filed by the plaintiff Nina Bertelmann naming as defendants the present defendants and the other two who now appear as plaintiffs.

The facts as set forth in the bill are substantially as



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follows: That the plaintiff Nina Bertelmann is twenty-two years of age, unmarried and without issue and is the "hanai" or adopted daughter of Susan C. Bertelmann. That Chris K. Mossman is twelve years of age and a grandson of said Susan C. Bertelmann. That Angeline K. Hogan is thirty-six years of age and a daughter of said Susan C. Bertelmann. That the defendant Helen M. Cockett is the daughter of said Susan C. Bertelmann and the wife of the defendant Joseph K. Cockett. That on the 3d day of January, 1912, the said Susan C. Bertelmann made, executed and delivered to the defendant Joseph K. Cockett a trust deed to certain lands then owned by her, a copy of said trust deed being attached to the complaint as an exhibit and made a part thereof, and that on said date said defendant Joseph K. Cockett accepted the trust created by said trust deed and consented to act as trustee thereunder. That on the 2d day of September, 1915, said Susan C. Bertelmann died. That on the 1st day of March, 1916, the defendant Joseph K. Cockett, without the knowledge or consent of the plaintiff and in violation of the duties of said trustee under said trust deed, with the intent to deprive plaintiff of her rights thereunder, made, executed and delivered to the defendant Helen M. Cockett, his wife, a deed of all the lands described in said trust deed. That plaintiff is informed and verily believes, and upon information and belief states that paragraph III of said trust deed referred to was inserted in said trust deed by mistake and that all provisions in said trust deed purporting to give to Helen M. Cockett any rights in the property mentioned in said trust deed were inserted therein through mistake and all provisions in said trust deed purporting to give to any one other than plaintiff, Chris K. Mossman and Angeline K. Hogan rights under said deed were

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inserted through mistake and are contrary to and do not express the true intent of said Susan C. Bertelmann when she executed said trust deed as shown by the terms thereof and the surrounding circumstances; and said Susan C. Bertelmann did not fully understand the purport and effect of said trust deed in all its provisions and details when she executed the same but as to the exact circumstances under which said mistake was made and said paragraph III of said trust deed was inserted and how the provisions purporting to give others than the plaintiff, Chris K. Mossman and Angeline K. Hogan rights and interests were inserted in said trust deed plaintiff is ignorant. That the defendant Helen M. Cockett has instituted a suit against plaintiff Nina Bertelmann in the first circuit court to quiet title to the land mentioned in said trust deed, which suit is now pending in said court.

The trust deed in question, a copy of which is attached to the complaint, conveys the land to Joseph K. Cockett forever, on the following trusts, to wit:

1. To permit the grantor during her lifetime to use and occupy the same, and to take all the rents, issues and profits thereof, said grantor paying all taxes, assessments, the mortgage on said land to Allen & Robinson and other charges to which the same may become liable.

2. (a) To execute and deliver a good and sufficient deed after the death of the grantor to one Nina Bertelmann, the "hanai" or adopted daughter of grantor, the "Ewa" or "Moanalua" half of said premises, immediately upon and after the said Nina Bertelmann shall have issue; but in case said Nina Bertelmann shall die without issue, then the said trustee shall convey in fee simple said half of said land to one Chris K. Mossman, herein-after mentioned, or to his heirs; provided, however, that

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the said mortgage on said land is paid, that is to say: that if said mortgage is not paid before the death of said grantor, then the said trustee shall properly and sufficiently convey the said land to one Helen M. Cockett, a daughter of said grantor as hereunder set out in paragraph No. "3" hereof. (b) To execute and deliver a good and sufficient deed after the death of the grantor to said Chris K. Mossman, the grandson of said grantor, the "Waikiki" or "city" half of said premises, after said Chris K. Mossman shall have reached and is 25 years old; but in case said Chris K. Mossman shall die without issue before reaching his 25th birthday, then the said trustee shall convey in fee simple the said half of said land to said Nina Bertelmann upon and after the said Nina Bertelmann shall have issue; provided, however, that the said mortgage on said land is paid, that is to say: that if said mortgage is not paid before the death of said grantor, then the said trustee shall properly and sufficiently convey said land to one Helen M. Cockett, a daughter of said grantor, as hereunder set out in paragraph No. "3" hereof. (c) But in case said Nina Bertelmann shall die without issue and said Chris K. Mossman shall die without reaching his 25th birthday or without issue, then the said trustee shall execute and deliver a good and sufficient deed in fee simple forever the whole of said land to the heirs at law of the said Chris K. Mossman, provided, however, that the said mortgage on said land is paid, that is to say: that if said mortgage is not paid before the death of said grantor, then the said trustee shall properly and sufficiently convey said land to one Helen M. Cockett, a daughter of said grantor as hereunder set out in paragraph "3" hereof.

3. To execute and deliver a good and sufficient deed upon the failure of the said grantor to pay the said

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"Allen & Robinson" mortgage, after the death of said grantor, to said Helen M. Cockett or to her heirs, the whole of said land.

The remaining provisions of the trust deed are not material to the discussion.

Plaintiff's prayer is that the lands be adjudged and decreed to be impressed with a presumptive, resulting trust in favor of plaintiff, Chris K. Mossman and Angeline K. Hogan, and that Helen M. Cockett be adjudged and decreed to hold said lands upon such trust in favor of said plaintiff as *cestui que trust*. That said trust deed be construed and the rights of plaintiff and all parties determined and that all parts of said trust deed inserted therein through mistake be stricken therefrom and the same reformed so as to express the true intent of said Susan C. Bertelmann. That the deed from Joseph K. Cockett to Helen M. Cockett be ordered, adjudged and decreed to be delivered up and the same canceled. That Helen M. Cockett be enjoined from prosecuting any further her action to quiet title against Nina Bertelmann until the final termination of this proceeding and from disposing of by deed or otherwise, the said lands or any part thereof until a final termination of this proceeding, and for such other and further relief as may seem equitable and just.

To the foregoing complaint the defendants Joseph K. Cockett and Helen M. Cockett demurred upon the following grounds:

"1. That said complaint does not set forth facts sufficient to constitute a cause of action and or to entitle the complainant to the relief therein prayed for nor to any relief.

"2. That said complaint is without equity.

"3. That it appears from said complaint that complainant as well as the grantor from whom she claims title have

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been guilty of gross and inexcusable laches in presenting the case, and that complainant is now barred from so doing by said laches.

"4. That it does not appear from said complaint that the deed of trust therein mentioned was not the free and voluntary act of complainant's grantor Susan C. Bertelmann, executed with sufficient motives and on sufficient consideration.

"5. That said complaint shows that complainant has no right title or interest in the real estate in question.

"6. That said complaint is ambiguous, unintelligible and uncertain in that (a) a conclusion merely is pleaded as to the alleged mistake in executing said trust deed, and no facts are alleged nor any circumstances from which mistake can be inferred; (b) the complaint shows that complainant is ignorant as to the facts and circumstances surrounding the execution of said trust deed, and is ignorant of any facts and circumstances showing mistake on the part of said grantor, Susan C. Bertelmann, in the execution and delivery of said trust deed; (c) the allegations in said complaint are argumentative and not positive and do not set forth facts showing that said grantor did not make the provisions which she desired and intended to make for said complainant as well as for the other beneficiaries mentioned in said deed."

After issue was joined on the demurrer, by stipulation of the parties approved by the court, the defendants Chris K. Mossman and Angeline K. Hogan were joined with Nina Bertelmann as plaintiffs and the case considered at issue between said parties on demurrer.

The demurrer was overruled and the defendants (with leave of court) appealed to this court.

This action is substantially a proceeding to construe a trust deed voluntarily made and testamentary in character and to correct an alleged mistake therein. The instrument which the court is asked to correct and construe being voluntary and testamentary in character

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we think the law applicable to wills in like cases applies here (40 Cyc. 1756; *Chater v. Carter*, 22 Haw. 34; *Simerson v. Simerson*, 20 Haw. 57; *Nahaolelua v. Heen*, 20 Haw. 372).

There is no allegation or intimation that the execution of the instrument in question was procured or induced by fraud or undue influence, the plaintiffs relying solely on their contention that certain of the provisions of said instrument were inserted by mistake and insist that said provisions so inserted by mistake be stricken out and the remaining provisions of the instrument be permitted to stand.

It will be seen from an examination of the trust instrument that the grantor's wish as expressed therein was, (1) That she be permitted to use and occupy the land during her lifetime, she to pay all taxes, charges and the Allen & Robinson mortgage. (2) If she died leaving the said mortgage unpaid, the trustee to convey the land to Helen M. Cockett defendant herein. (3) If, before her death, she paid the Allen & Robinson mortgage the trustee to convey the land to said Nina Bertelmann and Chris K. Mossman upon their performing the conditions precedent therein imposed, which have neither been performed nor become impossible of performance.

A court of equity has jurisdiction to correct mistakes in a will when the mistake is apparent on the face of the will or may be made out by a due construction of its terms. But the mistake must be apparent on the face of the will, otherwise there can be no relief, for parol evidence, or evidence *dehors* the will is not admissible to contradict, vary or control the words of the will, although it is in certain cases admissible to explain the meaning of the words which the testator has used (*Kerr on Fraud and Mistake* 448; *Hunt v. White*, 24 Tex. 643-653; *Goode v. Goode*, 22 Mo. 518).

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"But it seems that if a clause be inadvertently introduced there may be an issue to try whether it is a part of the testator's will" (Adams on Equity 172; *Goode v. Goode, supra*).

"The power of a court of chancery to grant relief in case of mistake in written instruments, does not go to the extent of adding to or changing the nature and legal import of the writing. That would be to contravene the rule which obtains as well in courts of chancery as in courts of law, that parol contemporaneous evidence is inadmissible, to contradict or vary the terms of a valid written instrument. The case of wills does not constitute an exception to the application of this rule" (*Hunt v. White, supra*).

Extrinsic evidence of intention as an independent fact is inadmissible for the purpose of filling up a total blank in a will, or of supplying a devise, or other material provision, term or qualification omitted by mistake; and that for this purpose the clearest oral declarations of intent are inadmissible. His intent must be ascertained from the meaning of the words in the instrument and from those words alone (1 Jarm. Wills 353).

It is not to be presumed that a mistake has been made by the grantor in the provisions of such an instrument as this merely because its terms amount to what (if it were a will) is sometimes called an unnatural will because a testator may make an unnatural will if he does so freely and with a sound mind (*In the Matter of the Will of Charles Notley*, 15 Haw. 435).

The provisions of the trust deed in this case may not be commendable, may not be what the court might think they should be, but they do not contravene any rule of law that we are aware of. The question is not what provision Mrs. Bertelmann should have made for the plaintiffs in the disposition of her property, but whether her right to dispose of her property as she pleased may be taken from her on mere suspicion that a mistake has been made and that too at a time when she cannot be heard.

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In the case of *In re Langford*, 108 Cal. 608, the court said:

“The consideration of the question whether or not a will is unnatural—by which is meant, we suppose, different from what it might have been expected to have been—is of no importance except in cases where there is some evidence immediately tending to show mental incapacity, fraud or undue influence; in which event it might serve to help out a weak case. \* \* \* A will cannot be upset because in the opinion of a jury or the court it is unnatural. In the opinion of the *McDevitt* case it is said: ‘Although I do not think it of special interest here, it is well to remember that one has the right to make an unjust will, an unreasonable will, or even a cruel will.’ ”

It seems to us that the plaintiffs in this case are asking the court to hold that the provisions complained of do not express the will or intent of the grantor and were inserted in the trust deed by mistake, solely on the ground and for the reason that said provisions are unnatural, or as stated in their brief because a practical joke has been perpetrated upon them. The allegations in their bill amount to this and nothing more.

Applying these principles of courts of equity as to reforming instruments of this character or correcting mistakes in them to the case now before us, we think that there is no mistake apparent on the face of the trust deed; none that can be made out by a due construction of its terms, and it manifestly is not a case for relief in equity on the ground of mistake.

The plaintiffs have asked that the trust deed in question be construed and the rights of all parties to this action determined.

Performance of the primary condition precedent (payment of the mortgage by the grantor), upon which the trustee was to convey the property to the plaintiffs, is not alleged, and will not be presumed, and its performance



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having become impossible by the death of the grantor the trustee was authorized to make the conveyance to Helen M. Cockett.

We are therefore unable to see wherein plaintiffs have shown themselves to be entitled to any interest whatever in the land in question, and a further construction of the instrument is therefore unnecessary.

The order of the circuit judge overruling the demurrer is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

*W. J. Robinson* (*H. L. Grace* and *C. S. Davis* with him on the brief) for plaintiffs.

*C. F. Peterson* for defendants.

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ANNA M. W. PETERSON *v.* HARRY PETERSON.

No. 1068.

ERROR TO DISTRICT MAGISTRATE OF HONOLULU.

SUBMITTED APRIL 5, 1918.

DECIDED APRIL 11, 1918.

COKE, C. J., QUARLES AND KEMP, JJ.

**DIVORCE**—*authority of court to grant where actual jurisdiction of defendant not acquired.*

Owing to the fact that an action for divorce is in the nature of a proceeding *in rem* under certain circumstances a court may render a valid decree of divorce although it never acquired actual jurisdiction of the person of the defendant.

**SAME**—*decree for alimony—jurisdiction of defendant required.*

A decree for the payment of money as alimony is essentially in

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*personam* and it is therefore totally void in the absence of actual jurisdiction over the person and property of the one against whom it is awarded.

**JUDGMENT**—*effect of full faith and credit clause of Federal Constitution applied to judgment of a sister State.*

Under the full faith and credit clause of the Federal Constitution a duly authenticated judgment of a court of a sister State, exercising its jurisdiction as a common law court, and presented in a court of this Territory, would carry with it the assumption that the court of the forum rendering the judgment not only had jurisdiction of the subject-matter of the suit but of the parties thereto and it would not be incumbent upon one who bases a right of action upon such a judgment to aver facts essential to the existence of jurisdiction.

**SAME**—*same.*

But it is an established rule that where a court of general jurisdiction has special and statutory powers conferred upon it which are wholly derived from statute and not exercised according to the course of common law or are not a part of its general jurisdiction it is to be regarded *quoad hoc* an inferior or limited court and its judgment to be treated accordingly, that is, its jurisdiction must appear upon the record and cannot be presumed.

**COURTS**—*jurisdiction in divorce matters.*

It is elementary that in the early history of jurisprudence in England the common law courts exercised no jurisdiction over divorce cases, jurisdiction in such matters resting entirely with the ecclesiastical courts of the realm. In the several States of the Union that jurisdiction rests alone with those courts upon which it has been expressly conferred by legislative enactment.

**SAME**—*same—pleading.*

This being true no presumption of jurisdiction obtains in such proceedings in any court of any of the States of the Union and all courts exercising jurisdiction in any such case must be taken and held to be courts of inferior or limited jurisdiction and in pleading such a judgment of another court it is necessary to aver in appropriate language its jurisdiction over the parties and the subject-matter of the suit.

## OPINION OF THE COURT BY COKE, C. J.

The defendant in error, hereafter designated the plaintiff, commenced an action in the district court of Honolulu

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against the plaintiff in error, hereafter designated the defendant, based upon a decree for alimony alleged to have been rendered in a divorce suit instituted by plaintiff against defendant in the superior court of California in and for the City and County of San Francisco. The plaintiff claims the sum of \$300 to be due her from the defendant by virtue of the decree entered in the California court. Although regularly served with process defendant failed to respond to the summons issued out of the district court of Honolulu and upon the default of defendant plaintiff proceeded *ex parte* to the proof of her case. The only evidence introduced by plaintiff was that of her attorney, who, after filing the decree in the divorce case, testified that under the provisions of the decree defendant was indebted to plaintiff in the sum of \$300. Judgment was thereupon rendered against defendant for that amount also for attorney's commissions and costs of court. Some weeks thereafter defendant appeared in the district court and filed a motion to vacate the judgment, open the default and for leave to answer. This motion, which was supported by the affidavit of defendant, recited in substance "That said defendant has a good and meritorious defense to said action, namely, that he is not indebted to said plaintiff in any sum and was not indebted to plaintiff at or before the filing of said action, nor has he been since indebted to plaintiff; that the decree of divorce purporting to award plaintiff alimony and or maintenance either for herself or for plaintiff's child, and which decree is and was the basis for the court's awarding judgment in favor of plaintiff, was and is null and void in so far as it purports or attempts to award alimony or maintenance in favor of plaintiff or her said child, for the reason that the court in which said decree of divorce was granted had no jurisdiction of the person of the defendant and personal service

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of said summons and libel and the proceedings had therein was never made upon defendant, and the defendant was not at the time of the filing of said divorce proceedings a resident of California where said cause was filed and decree granted, nor has he been in the State of California since three years immediately preceding the date of the filing of said proceedings, but on the contrary this defendant has resided in the Territory of Hawaii continuously for more than six years last past, and during that period has not been in the State of California; that the judgment made and entered in the above entitled cause is null and void." The motion was denied and defendant comes to this court on a writ of error.

For the proper consideration of the cause it will be necessary for us to consider only the second, third and fourth assignments of error, which are as follows:

"2. That said magistrate erred in rendering said judgment in favor of plaintiff and against defendant therein on the ground that there was not sufficient legal evidence upon which to base said judgment.

"3. That said magistrate erred in rendering said judgment in favor of plaintiff and against the defendant herein on the ground that the decree of divorce for alimony upon which said claim is and was predicated is from a foreign jurisdiction, namely, the State of California, and there was and is no showing that the court issuing said decree had jurisdiction of the defendant in said cause, Harry Peterson, nor was there any showing that personal service of summons in said divorce proceedings was made upon said Harry Peterson, nor was there any showing that said court in said divorce proceedings had any authority or jurisdiction to award a personal money judgment against said Harry Peterson.

"4. That said magistrate erred in rendering said judgment in favor of plaintiff and against defendant herein on the ground that the decree of divorce upon which said claim and judgment are predicated is and was void in so far as it

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awarded a personal money judgment against said defendant."

The record herein shows that a final decree of divorce was made by the California court dissolving the marriage between plaintiff and defendant in November 1914 and that the court in September 1915 entered a modifying or varying decree requiring defendant to pay to plaintiff the sum of \$25 per month for the education, maintenance and support of the minor child of the marriage during its minority, the child then being ten years of age. There is nothing in the plaintiff's complaint, the decree or modification thereof, or in any of the other records before us which shows that the California court had jurisdiction of the cause or of the parties thereto unless in a case of this nature it is proper to assume from the title of the court itself and from its record, which shows on its face that it is a court of record and has a seal and a clerk, that it had such jurisdiction. The record herein fails to show that the defendant was either actually or constructively served with process or that he ever submitted himself to the court's jurisdiction. This court is therefore, and we believe for the first time, called upon to determine what faith and credit, if any, should be given to a decree rendered by a court of a sister State under the circumstances disclosed by the records in this case, when the decree is made the foundation for an action in the courts of this Territory.

In order to enable the court in an action for divorce to render a decree for alimony which will be personally binding upon the defendant jurisdiction of the person of the defendant must be acquired and this jurisdiction cannot be acquired as regards a nonresident by constructive service. Owing to the fact that an action for divorce is in the nature of a proceeding *in rem* under certain circumstances a court may render a valid decree of divorce although it never

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acquired actual jurisdiction of the person of the defendant. A judgment for alimony, however, cannot be supported on the ground that it is a mere incident of and subordinate to the right to the divorce, for a decree for the payment of money as alimony is essentially one *in personam* and is therefore totally void in the absence of actual jurisdiction over the person and property of the one against whom it is awarded. Constructive service itself, whether made by publication or by actual service of process upon the defendant without the State, is insufficient. *Hekking v. Pfaff*, 43 L. R. A. 618; 9 R. C. L. 398; 1 R. C. L. 884.

Obviously it is true that if the defendant was not personally served with process in the divorce proceeding within the State of California and did not voluntarily submit to the jurisdiction of the court the decree therein rendered against him for the payment of alimony was void and it follows of course that no judgment should be rendered in the courts of this Territory in a proceeding based upon the decree for alimony where no showing is made that the California court had ever acquired jurisdiction of the person of the defendant. This violates no principle of state comity. Section 1, Article 4 of the Federal Constitution provides that "Full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof." Congress, in the execution of the power conferred upon it by the Constitution, prescribed the mode of attestation of records of courts of one State to entitle them to be proved in the courts of another State and enacted that records so authenticated should have such faith and credit in every court within the United States as they have by law or usage in the State from which they are taken. By virtue then of the

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full faith and credit clause of the Constitution and the statute made in execution thereof the States of the Union sustain toward one another a relation different from that of foreign countries and the judgments of sister States stand on a higher plane than foreign judgments and have an effect and efficacy not accorded to the latter. Judgments recovered in one State of the Union, when proved in the courts of another, whether state or national, within the United States, differ from judgments recovered in a foreign country in no other respect than in not being re-examinable on their merits nor impeachable for fraud in obtaining them if rendered by a court having jurisdiction of the cause and of the parties. See *Christmas v. Russell*, 5 Wall. 290 (18 L. ed. 475) ; *Cole v. Cunningham*, 133 U. S. 107.

If under the full faith and credit clause of the Constitution the district court of Honolulu was required by virtue of the properly attested decree of the California court which was presented to it to presume that the California court had acquired proper jurisdiction of the cause and of the parties it then was warranted in rendering the judgment now complained of by the defendant. Had the California court been proceeding according to the course of common law and exercising its jurisdiction as a common law court it could not be questioned that its authenticated judgment presented in a court of this Territory would carry with it the assumption that the court of California had not only jurisdiction of the subject-matter of the suit but of the parties thereto and it would not be incumbent on one who bases a right of action upon such a judgment to aver facts essential to the existence of jurisdiction. But it is an established rule that where a court of general jurisdiction has special and statutory powers conferred upon it, which are wholly derived from statute and not ex-

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exercised according to the course of common law or are not a part of its general jurisdiction, it is to be regarded as *quoad hoc* an inferior or limited court and its judgment to be treated accordingly, that is, its jurisdiction must appear upon the record and cannot be presumed. See 1 Black on Judgments, Sec. 275; *Kelley v. Kelley*, 161 Mass. 111, 117, 118. There is no presumption that a court of record in another State has jurisdiction to grant a divorce in a case where no service of process upon the libellee appears to have been made. *Commonwealth v. Blood*, 97 Mass. 538, 540. It is elementary that in the early history of jurisprudence in England the common law courts exercised no jurisdiction over divorce cases, jurisdiction in such matters resting entirely with the ecclesiastical courts of the realm. In the several States of the Union that jurisdiction rests alone with those courts upon which it has been expressly conferred by legislative enactment. This being true no presumption of jurisdiction obtains in such proceedings in any court of any of the States of the Union and all courts exercising jurisdiction in any such case must be taken and held to be courts of inferior or limited jurisdiction, and in pleading such a judgment of another court it is necessary to aver in appropriate language its jurisdiction over the parties and the subject-matter of the suit. *Galpin v. Page*, 18 Wall. 350; *Steele v. Steele*, 35 Conn. 48; *Robbins v. Robbins*, 140 Mass. 528. In pleading the judgments of courts of limited jurisdiction it is necessary to state the facts upon which such jurisdiction is founded. *Wheeler v. Raymond*, 8 Cowen 311, 314. In an action on a judgment recovered in another State, the record of which is duly authenticated and produced in evidence, it will be presumed that the court had jurisdiction of the subject-matter and the parties in the absence of proof to the contrary. But this rule does not apply where the



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jurisdiction was wholly dependent upon statute or the form of the proceedings unknown to the common law. 23 Cyc. 1577-78.

The plaintiff by failure to aver and prove that the court of the forum rendering the decree for alimony possessed jurisdiction over the person of the defendant, did not make out a *prima facie* case, and the judgment should have been for defendant.

The judgment of the district court herein is reversed.

*C. F. Peterson* for plaintiff in error.

*E. J. Botts* for defendant in error.

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TERRITORY v. JOHN WAIAMAU.

No. 1046.

RESERVED QUESTIONS FROM CIRCUIT COURT, FIFTH CIRCUIT.  
HON. L. A. DICKEY, JUDGE.

ARGUED APRIL 6, 1918.

DECIDED APRIL 12, 1918.

COKE, C.J., QUARLES AND KEMP, JJ. .

CRIMINAL LAW—*term of sentence.*

When a sentence is imposed under the indeterminate sentence laws of this Territory the term of the sentence is the maximum period fixed by the court.

SAME—*parole—effect of.*

After the prisoner has served the minimum term provided by law or imposed by the sentence of the court he may be allowed to go on parole but he is still in the legal custody and control of the prison authorities and is deemed still to be serving out the sentence imposed upon him.

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**SAME**—*cumulative sentences may be imposed.*

Courts may impose cumulative sentences and in so doing the term of the last sentence should commence from the termination of the sentence next preceding.

## OPINION OF THE COURT BY COKE, C. J.

This cause comes here on reserved questions from the circuit court of the fifth circuit. The questions reserved are as follows: “ 1. Has a circuit court now the power to impose cumulative sentences of imprisonment in cases of felony or has this power been repealed by implication by Chapter 216 of the Revised Laws of 1915 and Act 103 of the Session Laws of 1917? 2. If such power exists when should the term of imprisonment imposed by the second sentence begin? e. g. at the termination of the minimum term of imprisonment imposed by the prior sentence; at the time of the first parole granted; or at the absolute termination of the prior sentence whether by pardon, by expiration of the maximum term of imprisonment or by discharge of a warden under Sec. 7 Act 103 of 1917?”

Chapter 216 R. L. 1915 provides for the indeterminate sentence of persons convicted of felonies with certain specified exceptions, and this chapter, taken together with chapter 107 R. L. 1915, prescribes the regulations for the parole of prisoners. Act 103 S. L. 1917 amends the laws providing for the parole of prisoners as embraced within chapters 107 and 216 R. L. 1915. There is nothing in any of these enactments or elsewhere which restricts the right of a court to impose cumulative sentences after conviction on two or more indictments, or, where the defendant is already in execution, on a former sentence. Of course the sentences may also be made to run concurrently and this situation is clearly contemplated by the provisions of section 6 of Act 103 S. L. 1917, which says: “If a prisoner,

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other than those excepted from the provisions of this chapter, is confined upon more than one sentence, he may, nevertheless, be paroled with like effect as though but one sentence was impending over him." Where a sentence is imposed under the indeterminate sentence laws of this Territory the term of the sentence is the maximum period fixed by the court. After the prisoner has served the minimum term provided by law or imposed by the sentence of the court he may be allowed to go on parole but he is still in the legal custody and control of the prison authorities and is deemed still to be serving out the sentence imposed upon him. *In re Gertz*, 21 Haw. 526; *Ughbanks v. Armstrong*, 208 U. S. 481; *Commonwealth v. Kalck*, 239 Pa. 543. Prior to the expiration of the maximum term of sentence certain events may occur which will bring about a termination of the sentence. Executive clemency may be extended or a reversal of the judgment of conviction may be had in the appellate court. The term of imprisonment would then cease. In that case if a second cumulative sentence were impending over the defendant the same would at once become operative. Therefore, where a court imposes a cumulative sentence the term of the last sentence should commence from the termination of the sentence next preceding and the last sentence should so state, otherwise the two punishments will be executed concurrently. *Brown v. Commonwealth*, 26 Am. Dec. 130; *Fitzpatrick v. People*, 98 Ill. 269; *Fortson v. Elbert Co.*, 43 S. E. 492.

Our answer then to the first reserved question is that the circuit courts of this Territory have the power to impose cumulative sentences of imprisonment, and our answer to the second reserved question is that where a court imposes a cumulative sentence the term of the last sentence pronounced should commence from the termination of the sentence next preceding.

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*I. M. Stainback*, Attorney General (*S. K. Kaeo*, County Attorney of Kauai, also on the brief), for the Territory.

No appearance for defendant.

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LUCY K. PEABODY, LUCY K. HENRIQUES, KAHOWAI (w), MANELE LAANUI AND CHARLES A. REEVES *v.* LUIKA PAAKAUA.

No. 1060.

APPEAL FROM DISTRICT MAGISTRATE OF SOUTH KONA.

SUBMITTED APRIL 5, 1918.

DECIDED APRIL 13, 1918.

COKE, C.J., QUARLES AND KEMP, JJ.

**SUNDAY—time—computation.**

In computing the time in which a summons may be made returnable if the last day falls on Sunday the summons may properly be made returnable on Monday, the next legal day.

**APPEAL AND ERROR—order sustaining motion to quash summons not appealable.**

An order of a district magistrate sustaining a motion to quash a summons is not a final order, and therefore is not appealable.

**OPINION OF THE COURT BY KEMP, J.**

This is an appeal on points of law from an order of a district magistrate sustaining defendant's motion to quash the summons and service of summons in a summary proceeding for the restitution of certain land, the property of plaintiffs.

The summons was dated and issued on Tuesday, Novem-

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ber 27, 1917, and was returnable Monday, December 3, 1917.

On the return day named in the summons the defendant appeared and made a motion to quash the summons and the service of summons on the ground that said summons was not made returnable within the time prescribed by statute in such cases, which motion was granted and the summons quashed.

From this order the plaintiffs appealed to this court upon one point of law as follows: "The court erred in granting the defendant's motion to quash the summons and service of summons herein \* \* \* on the ground that the said summons was not made returnable within the time for the return of summons as is by statute in such cases made and provided."

The statute providing when summons in this class of cases shall be returnable is as follows: "The summons shall be returnable within such time as shall appear reasonable to the magistrate, not less than three, nor more than five days" (Sec. 2757 R. L. 1915).

In this case the last day of the five day period was Sunday. The question therefore which the plaintiffs seek to have us decide is, when, as in this case, the last day of the five day period in which the magistrate may make the summons returnable falls on Sunday, it is a compliance with the statute to make the summons returnable on the following day, Monday?

The appellants' contention is that Sunday is a *dies non* and should be disregarded in the computation of time, thus bringing the return day in this instance within the time limited by the statute; that Sunday not being a day in contemplation of law the summons in this case was not returnable more than five days from the day it was issued.

"As Sunday is *dies non* in regard to judicial proceedings \* \* \* it is a general rule, made by statute in many

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jurisdictions, that when the last day of a period of time within which an act is to be done falls on Sunday, that day is excluded from the computation, and the act may be rightfully done on the following day, an exception to the rule existing where the act in question may be lawfully done on Sunday" (38 Cyc. 329).

If the foregoing general rule as quoted from Cyc is applicable to the case at bar it is evident that the motion to quash the summons and return should have been overruled.

This case does not fall within the exception as being an act that may be rightfully done on Sunday, and had the summons been made returnable on Sunday it would have had the effect of making it returnable on Monday, the next legal day (*Ostertag v. Galbraith*, 23 Neb. 730, 37 N. W. 637).

Our own statute relating to circuit court proceedings (Sec. 2404 R. L. 1915) provides that "the time within which an act is to be done, as provided in any part of this chapter (Chap. 137) shall be computed by excluding the first day and including the last. If the last day be Sunday it shall be excluded."

In the case of *Scott v. Linder*, 18 Haw. 7, this court applied the above provision of our statute in determining whether notice of appeal was filed in time although the provision of the statute relating to notice of appeal is not included in the chapter to which this section of the statute specifically relates, and held that where the last day of the five days allowed for filing notice of appeal falls on Sunday that it may be filed on Monday, the court saying: "We do not think that the notice is required to be filed on Sunday for, with the exceptions made by statute concerning the issue of certain writs of necessity, Sunday is a *dies non juridicus*." See also *Territory v. Ah On*, 17 Haw. 19, 21.

We are of the opinion that when the last day of the five allowed by statute falls on Sunday the Sunday should be

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excluded and that it is a compliance with the statute to make the summons returnable on Monday. The district magistrate therefore erred in quashing the summons.

We have expressed our opinion of the district magistrate's ruling in this case for the purpose of giving him and the litigants the benefit of our views on this important matter of practice, but in our opinion there has been no such judgment rendered as would justify an appeal. Ordinarily the question of whether the judgment, order or decision appealed from is one from which an appeal will lie is raised in this court by the motion of the appellee to dismiss the appeal, but in this case the appellee has not appeared and the question has therefore not been raised by the parties. However we do not want to establish a precedent by ignoring a question which goes to the jurisdiction of the court and we will therefore consider the question on our own motion.

Under the provisions of section 2507 R. L. 1915 "Appeals shall be allowed from all decisions of district magistrates in all matters whether civil or criminal, to the circuit court of the same circuit, \* \* \* but exceptions upon questions of law may be taken to the supreme court; provided, that any appeal solely upon points of law from a decision of a district magistrate shall be so stated in the notice of appeal and such appeal upon points of law may be made either to the circuit court of the same circuit or to the supreme court."

This court in construing the above provision of our statute has repeatedly held that in an appeal upon points of law from a decision of a district magistrate the "decision" appealed from must be final (*Prov. Gov't v. Ah Un*, 9 Haw. 164; *Prov. Gov't. v. Smith*, Id. 178; *Brown v. Carvalho*, Id. 180; *Prov. Gov't. v. Hering*, Id. 181, 187; *Prov. Gov't. v. Aloiau*, Id. 399, 401; *Lyman v. Winter*, 15

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Haw. 424, 426; *Correa v. Baldwin*, 16 Haw. 782; *Gear v. Henry*, 21 Haw. 54).

What then is a final decision? "When the order, judgment or decree finally determines the rights of the parties as to the controversy, or some material portion thereof, and provides the means of carrying the order, judgment or decree into effect it is final. But when further action of the court in the cause is necessary to give completely the relief contemplated by the court, the decree upon which the question arises is not to be regarded as final" (*Honolulu Athletic Park v. Lowry*, 22 Haw. 733, 738).

In the case of *Rodrigues v. Correia et al.*, 20 Haw. 563, the plaintiff filed a bill in equity upon which process in the usual form in equity cases was issued and served upon two of the defendants and returned unserved as to one. The defendants who had been served appeared specially and moved to quash the summons. The motion was granted. The plaintiff appealed and in this court the defendants moved to dismiss the appeal on the ground that the order appealed from was interlocutory and the appeal not allowed by the circuit judge. In disposing of this motion the court said:

"Plaintiff's right to maintain the appeal depends, therefore, upon whether the order can be regarded as a final one. A decree or order which is not final is not appealable. *Barthrop v. Kona Coffee Co.*, 10 Haw. 398; *Atcherley v. Jarrett*, 19 Haw. 511, 513.

"As appears from the order appealed from, the bill in this case was not dismissed; the summons, only, was quashed. Nothing appears in the record and no reason has been suggested, to indicate that another summons may not issue upon its allowance by the circuit judge, if such allowance is necessary. \* \* \* But as the matter now stands the bill must be regarded as still pending. Plainly, therefore, there was no finality to the order appealed from. It was not an appealable order."



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For authorities from other jurisdictions supporting this holding see *Winn v. Carter Dry Goods Co.*, 102 Ky. 370; *Warren v. Smith*, 80 Ky. 216; *Oland v. Agr. Ins. Co.*, 69 Md. 248; *Orton v. Noonan*, 32 Wis. 104; *Persinger v. Tinkle*, 34 Neb. 5; *Lewis v. Barker*, 46 Neb. 662, and cases cited.

In the case of *Gear v. Henry*, *supra*, it was held that an order overruling a motion to quash the summons was not final, but interlocutory and therefore not appealable. We are not unmindful of the fact that some courts which do not allow an appeal from an order overruling a motion to quash the summons do allow an appeal from an order sustaining the motion, holding that the order quashing the summons is equivalent to a dismissal of the action, and therefore final, but in the absence of an order of the magistrate dismissing the cause we are unwilling to concede the correctness of the holding.

The record in this case does not contain an order dismissing the cause and it is therefore still pending in the court below. There is nothing to prevent the plaintiffs from having an alias summons issued and served on the defendant and a final judgment rendered on the merits.

We are of the opinion, and hold, that the order of the district magistrate sustaining the defendant's motion to quash the summons and service of summons is not final but interlocutory and an appeal will not lie therefrom.

The appeal is dismissed.

*H. G. Middleditch* for plaintiffs.

No appearance for defendant.

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IN THE MATTER OF THE CONTEMPT OF  
GOO WAN HOY.

No. 1048.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

HON. S. B. KEMP, JUDGE.

ARGUED APRIL 10, 1918.

DECIDED APRIL 17, 1918.

COKE, C. J., QUARLES, J., AND CIRCUIT JUDGE EDINGS IN  
PLACE OF KEMP, J., DISQUALIFIED.CONTINUANCE—*abuse of discretion.*

It is not an abuse of discretion for the trial judge to refuse at the close of the hearing the verbal request for a continuance which is not supported by a showing that the accused can and will produce further evidence material to his defense although some of the developments during the hearing may tend to surprise the accused.

*Per Curiam:* Information was filed against the appellant charging him with contempt of court in that he did while an equity suit was being heard remove, mutilate and attempt to destroy a certain letter introduced in evidence at said hearing. The appellant heretofore moved in this court for the admission of newly discovered evidence, which motion we denied for the reasons stated in the opinion (*ante* page 71).

Being unauthorized to review the evidence the only question before us is the one raised by appellant's assignment of error that the circuit judge erred in refusing the oral request of appellant for a continuance under the following circumstances: After the matter had been heard, and the evidence pro and con closed, the circuit judge was handed an anonymous letter containing what purported

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to be portions of the missing letter with the statement therein that the pieces so enclosed had been in the possession of one Malani, a witness for appellant in the equity suit. The evidence tended strongly to show that appellant had taken the missing letter from the court room, took it to a toilet bowl in the building and while standing facing the toilet bowl had torn the letter to pieces and thrown them into the bowl, after which he flushed it. Soon after leaving the toilet two pieces of paper, one blank and the other containing what appears to be a portion of the letter addressed to Mr. W. G. Let, Honolulu, T. H., to whom the missing letter was addressed, were found in the toilet bowl. The accused verbally requested a continuance to enable him to make an investigation, but his request for such continuance was not supported by affidavit or other showing to the effect that the appellant could or would bring further evidence material to his defense for the purpose of overcoming the case made against him on behalf of the prosecution, which request was denied.

It is not an abuse of discretion for the trial judge to refuse at the close of the hearing the verbal request of the accused for a continuance which is not supported by a showing that the accused can and will produce further evidence material to his defense although some of the developments during the hearing may tend to have surprised the accused.

The judgment is affirmed.

*I. M. Stainback*, Attorney General, for the Territory.

*J. Lightfoot* (Lightfoot & Lightfoot on the brief) for respondent.

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THE HENDRIE AND BOLTHOFF MANUFACTURING & SUPPLY COMPANY *v.* CLINTON A. PEDRICK, DEFENDANT; CONSOLIDATED AMUSEMENT COMPANY, LIMITED, GARNISHEE.

No. 1073.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.  
HON. S. B. KEMP, JUDGE.

ARGUED APRIL 10, 1918.

DECIDED APRIL 18, 1918.

COKE, C.J., QUARLES, J., AND CIRCUIT JUDGE EDINGS  
IN PLACE OF KEMP, J., DISQUALIFIED.

**STATES—*their relationship.***

While several States of the Union have no independent political existence in an international sense they sustain toward each other, except as limited by the Federal Constitution, a strictly foreign relation.

**LIMITATION OF ACTIONS—*cause of action arising in foreign country or State.***

A territorial statute providing that actions for the recovery of any debt founded upon contract, obligation or liability, where the cause of action arose in any foreign country, shall be commenced within four years after the cause of action accrued, held: The State of Colorado is a foreign country within the contemplation and meaning of the foregoing statute.

OPINION OF THE COURT BY COKE, C.J.

On May 8, 1917, in the court below the plaintiff, appellee, instituted an action against the defendant, appellant, on an account stated which was had between the parties in the State of Colorado on the 27th day of June, 1911. Defendant in his answer set up the statute of limitations as a bar to the action. The statute plead

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by defendant is as follows: "The following actions shall be commenced within four years after the cause of action accrued and not after. Actions for the recovery of any debt founded upon any contract, obligation or liability, where the cause of action has arisen in any *foreign country*, except such as are brought upon the judgment or decree of a court of record." Sec. 2638 R. L. 1915.

The plaintiff filed a demurrer to that portion of defendant's answer pleading the foregoing statute and urging that the statute referred to foreign countries and that the State of Colorado could not be considered a foreign country. The court below sustained the demurrer and the defendant comes here by interlocutory appeal. The court below apparently rested its decision upon the definition of "foreign country" adopted by the majority opinion of the Supreme Court of the United States in the case of *De Lima v. Bidwell*, 182 U. S. 1, to the effect that a foreign country is one exclusively within the sovereignty of a foreign nation and without the sovereignty of the United States. Originally this same definition was pronounced by Mr. Chief Justice Marshall and Mr. Justice Story. *The Boat Eliza*, 2 Gal. 4; *Taber v. United States*, 1 Story 1; *The Ship Adventure*, 1 Brock. 235, 241. These last cases had to do with the interpretation of the maritime laws of the United States, and in the *De Lima* case, above referred to, the court's definition was pronounced with reference to the application of the tariff laws of the United States and it was held that with the ratification of the Treaty of Peace between the United States and Spain in 1899 the Island of Porto Rico ceased to be a foreign country within the meaning of the tariff laws. But in determining the relation of one State to another or the relation of the laws of one State to the laws of another

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State we find that the rule pronounced in the *De Lima* case and the other cases cited is not applied. The United States is a sovereignty composed of many sovereign States.

Except to the limited extent to which the Federal Constitution has provided otherwise the States are entirely independent and sustain toward each other the relation of foreign States. Special duties or restrictions are imposed by the Constitution upon States in interstate relations in connection with the extradition, the proof and the effect of judgments, the privileges and immunities of citizens and similar matters. The principles of international comity apply as between the States, but comity between States, so far as concerns the rights, privileges and immunities of each other's citizens not guaranteed by the Federal Constitution must yield to the laws and policy of the State in which it is invoked. And while the States have no independent political existence in an international sense they sustain toward each other, except as limited by the Federal Constitution, a strictly foreign relation. That is to say, aside from the exception mentioned they are independent and foreign sovereignties. *Fisher et al. v. Fielding*, 34 Atl. 714; *Davis v. Morton, Galt & Co.*, 96 Am. Dec. 309; 15 R. C. L. 196.

In defining the status of a bill of exchange drawn in one State of the Union on a person living in another State the Supreme Court of the United States held that the bill should be treated as a foreign bill of exchange. The court said: "For all national purposes embraced by the Federal Constitution the States and citizens thereof are one, united under the same sovereign authority and governed by the same laws. In all other respects the States are necessarily foreign to and independent of each

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other. Their constitutions and forms of government being, although republican, altogether different, as are their laws and institutions. This sentiment was expressed with great force by the president of the court of appeals of Virginia \* \* \* where he states that in cases of contracts the laws of a foreign country where the contract was made must govern, and then adds as follows: 'The same principle applies, though with no greater force, to the different States of America; for though they form a confederated government, yet the several States retain their individual sovereignties, and, with respect to their municipal relations, are to each other foreign.' " *Buckner v. Finley, et al.*, 2 Pet. 586, 590, 591. The term "foreign country" for all legal purposes embraces a neighboring State. 19 Cyc. 1352. The supreme court of Kentucky, in the construction of a state statute which provided that the statute of limitations should not run against a person without the country, held that the word "country" should not be construed to mean the United States but should be construed to mean the State of Kentucky. In its opinion the court said: "This State may certainly with propriety be called a country, and when the legislature used the expression 'the country,' it is natural to suppose that they meant the country for which they were legislating." *Mansell's Administrator v. Israel*, 6 Ky. 510, 514.

The plaintiff relies strongly upon the authority contained in the *De Lima* case *ante*. But as we have pointed out, that decision and the authorities therein referred to had solely to do with the construction and application of the laws of the Federal government and nowhere therein was the relationship of one State to another or the relation which the laws of one State bore to the

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laws of another State touched upon. Following the wise maxim expressed by Mr. Chief Justice Marshall "that general expressions in every opinion are to be taken in connection with the case in which those expressions are used" we can find in the cases cited no authority in support of the decision of the court below.

The statute relied upon by the defendant herein as a bar to the claim of plaintiff was first enacted by the legislature of the Hawaiian Kingdom in the year 1892. At that time Hawaii was an independent and sovereign nation. The same statute, however, was reenacted by the legislature of the Territory of Hawaii in 1905 and again reenacted in 1915. The defendant points out that where a statute has been in force for a long period of time, and is reenacted, the same application and force should be given it that obtained at the time of its original enactment, and as it is clear that at the time the statute was enacted in 1892 by the legislature of the Kingdom of Hawaii the State of Colorado was a foreign country it should still be so considered. We do not think that this point is material. Even had the statute in question been enacted for the first time by the legislature of the Territory of Hawaii in 1905 we would be bound to hold that the State of Colorado was and is a foreign country so far as the laws of Hawaii are concerned, except where otherwise provided by the Federal Constitution, and that plaintiff's claim would be barred by virtue of the statute if the action was not commenced within four years after the cause of action accrued.

The judgment of the lower court sustaining the plaintiff's demurrer is reversed and the cause is remanded to the lower court for further proceedings consistent with this opinion.



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*W. T. Rawlins* for plaintiff.

*W. B. Pittman* (Andrews & Pittman on the brief),  
for defendant.

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GOO WAN HOY v. ROSE McKEAGUE AND DANIEL  
McKEAGUE.

No. 1066.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.  
HON. C. W. ASHFORD, JUDGE.

SUBMITTED APRIL 15, 1918.

DECIDED APRIL 18, 1918.

COKE, C.J., QUARLES AND KEMP, JJ.

APPEAL AND ERROR—*instruction—illegal consideration.*

Where a requested instruction erroneously assumes that if a part of the consideration for the note sued on was illegal the burden of showing to what extent such consideration was illegal devolves upon the defendant and in the absence of such evidence the jury should find the full amount of the note in favor of the plaintiff such requested instruction is properly refused.

BILLS AND NOTES—*illegal consideration.*

A note given in part for intoxicating liquors sold without a license to sell the same, the note not showing on its face how much of the consideration was for such liquors, is indivisible and is void on account of illegality in the consideration.

OPINION OF THE COURT BY QUARLES, J.

This is an action of assumpsit upon a note which was given by the defendants to Pong Kong Sing and by the latter, after maturity, assigned to the plaintiff for col-

## Opinion of the Court.

lection. The cause was tried to a jury resulting in a verdict in favor of the defendants. With the answer defendants filed an affidavit showing that the note was given for intoxicating liquors sold by the payee to the payors the payee having no license to sell intoxicating liquors, and claiming that by reason of such fact the note is void. At the trial the defendant Rose McKeague testified that the note was given for intoxicating liquors, samshu, gin and wine, sold by Pong Kong Sing to her husband, portions of which were by him drank on the premises where sold and portions of the same taken to the home of the defendants. Pong Kong Sing testified that the note was given in settlement of merchandise sold by him consisting alone of food-stuffs and wearing apparel. It was admitted that Pong Kong Sing had no license to sell intoxicating liquors. The cause is before us upon exceptions by the plaintiff, three of which were to the action of the court in giving and refusing instructions, and one to the verdict.

One exception is to the refusal of the court to allow plaintiff's request for the following instruction: "I instruct you, that if you believe from the evidence that the note in evidence in this case was given by the defendants to Pong Kong Sing in payment of an account due to said Pong Kong Sing and that said account contained, in part, items for the purchase price of certain intoxicating liquors sold by Pong Kong Sing that it is your duty to return a verdict for the plaintiff, in the amount of One Hundred and Ninety-seven 40/100 Dollars, with interest, less any sum, which has been proven to you by a preponderance of evidence to have been the purchase price for certain intoxicating liquors illegally sold by Pong Kong Sing."

The court gave the following instruction requested

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by the defendants: "If you find from the evidence that a part of the consideration for the note mentioned in the complaint was the price of intoxicating liquor sold by Pong Kong Sing to the defendants, or either of them, you have to deduct the amount of such consideration from the principal of the note and return a verdict for the balance only after such deduction" to which plaintiff excepted.

The court gave the following instruction: "Now, gentlemen, the court instructs you, of its own motion, if you believe that the price of intoxicating liquors sold by Pong Kong Sing to the McKeagues, or either of them, constituted any part of the consideration for the note in this case, then that fact vitiates the consideration of the note, and the plaintiff, as the assignee of the note can recover only so much as he shall prove to you is represented by a legal consideration; in other words, the consideration, the reason of the giving of the note having been once vitiated and impugned, it is not for the defendants to show to what extent it has been vitiated but it is for the plaintiff to show to what extent it is good, and, if he has not shown you to what extent it is good, and, if you believe that to some extent it is bad, why then, manifestly, you have nothing before you upon which you can find for him in any specific amount. You see the obvious conclusion?" to the giving of which instruction by the court the plaintiff excepted.

The said request for instruction by the plaintiff was properly refused as it erroneously assumed that if a part of the consideration for the note was illegal that the burden of showing how much of it was illegal devolved upon the defendants, and in the absence of evidence showing how much was illegal that plaintiff was entitled to recover the whole. This is not the law. The re-

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requested instruction given by the court at the instance of the defendants and the instruction given by the court on its own motion were more favorable to the plaintiff than is justified by the law. The law is pretty well settled that where a note is given for an entire sum of money, the consideration or a part thereof being illegal, the whole note is vitiated and there can be no recovery thereon. We have a statute (Sec. 2155 R. L.) which prohibits the sale of intoxicating liquors without a license so to do and makes such sale a criminal offense. Section 8 of the Revised Laws is as follows: "Whatever is done in contravention of a prohibitory law is void, although the nullity be not formally directed." Under the head of "Bills and Notes" we find in 3 R. C. L., par. 149, a well written summary of the law as follows:

"A partial want or a partial failure of consideration avoids a note only pro tanto, but illegality in a part of the consideration upon which the promise contained in the note is founded avoids the entire promise and renders the entire note uncollectible. The reason of this distinction is said to be founded, partly at least, on grounds of public policy, and partly on the technical notion that the security is entire, and cannot be apportioned; and it has been said, with much force, that where parties have woven a web of fraud or wrong, it is no part of the duty of courts of justice to unravel the threads and separate the sound from the unsound. Whatever its foundation may be, the doctrine is abundantly sustained by the whole current of the decisions on the subject, both in England and in this country. And, in general, it makes no difference, as to the effect, whether the illegality arises under the common law or a statute. It is true that there are cases arising upon contracts based in part upon a legal, and in part upon an illegal, consideration where the courts have permitted an enforcement to the extent of the good consideration. Where

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the consideration for a contract is made up of several distinct transactions or several parts, some of which are legal while others are illegal, but the legal portions of the consideration can be separated from the illegal portion, the contract will be upheld. But it is equally true that if any part of an indivisible promise, or any part of an indivisible consideration for a promise, is illegal, the whole is void, and no action can be maintained thereon. And when the legal and illegal considerations are blended and a promissory note is taken for the whole, the note is deemed to be entire and indivisible. This rule frequently has been applied to notes given in payment of accounts consisting in part of articles, intoxicating liquors for example, sold in violation of law. In such a case recovery on the instrument is denied." See cases cited in the foot-notes, especially the case of *State v. Wilson*, 73 Kans. 343, and notes to the same case in 117 Am. St. Rep. commencing on page 493.

A note given in part for intoxicating liquors sold without a license to sell the same, the note not showing on its face how much of the consideration was for such liquors, is indivisible and is void on account of illegality in the consideration.

The exceptions are overruled.

*Lightfoot & Lightfoot* for plaintiff.

*E. K. Aiu* for defendants.

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HANNAH MAKAINAI *v.* SOLOMON K. LALAKEA,  
ET AL.

No. 1076.

RESERVED QUESTIONS FROM CIRCUIT JUDGE, FOURTH CIRCUIT.  
HON. C. K. QUINN, JUDGE.

ARGUED APRIL 11, 1918.

DECIDED APRIL 20, 1918.

COKE, C. J. QUARLES AND KEMP, JJ.

**FRAUD—pleading.**

In alleging fraud the rules of good pleading require that the inculpatory facts be specifically alleged so that the pleading on its face discloses the mode in which the fraud was accomplished.

**EQUITY—jurisdiction**

The several circuit judges may exercise their equity jurisdiction when and only when the party has no plain, adequate and complete remedy at law.

**SAME—same—void deed—accounting.**

While ejectment is the proper remedy to recover land from one holding under a void deed, equity will entertain jurisdiction where the plaintiff cannot obtain complete relief at law and alleges facts showing that he is entitled to a discovery and accounting for rents of the land in controversy.

**SAME—pleading—discovery.**

A bill for relief upon the ground of discovery must aver that the facts sought to be discovered are material to the cause of action; that the party has no means of proving them in a court of law and that the discovery of them by respondent is indispensable as proof.

**SAME—same—accounting.**

Equity will relieve where the bill discloses that there is an account between the parties which cannot be conveniently and properly adjusted and settled in an action at law.

## OPINION OF THE COURT BY KEMP, J.

Hannah Makainai filed her amended bill in equity naming as respondents her brother Solomon K. Lalakea

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and other brothers and sisters and children of two deceased sisters. By said bill she shows in effect that Thomas K. Lalakea, the common ancestor of petitioner and respondents, died intestate on May 7, 1915, seized and possessed of much valuable real estate in the Territory of Hawaii and leaving the petitioner and respondents as his heirs at law. That immediately after the death of said Thomas K. Lalakea the said Solomon K. Lalakea took possession of all the papers, documents and writings situate and then being on the premises theretofore occupied by said Thomas K. Lalakea. That thereafter on May 8, 1915, the said Solomon K. Lalakea presented a deed purporting to be signed by said Thomas K. Lalakea and witnessed by D. Namahoe and said Solomon K. Lalakea to a proper officer before whom said subscribing witnesses swore to the signing, sealing and delivery of said deed. That thereupon said officer attached to said purported deed his certificate in accordance with said evidence and said purported deed was thereafter on the 11th day of May, 1915, recorded in the registry office Oahu in Liber 428, p. 12 et seq., a copy of said deed (being a deed from Thomas K. Lalakea to Solomon K. Lalakea conveying twenty-five parcels of land, for the consideration of one dollar and love and affection) is attached to the bill and made a part thereof. That the said Thomas K. Lalakea, in his lifetime, did not deliver the said deed to the said respondent. That the said Solomon K. Lalakea immediately upon the recording of said purported deed entered upon the lands described therein and at all times from the date of said recordation to the date hereof has received the rents, issues and profits of said lands, and claimed to be the sole and exclusive owner thereof by virtue of said purported deed. That said Solomon K. Lalakea has an in-

## Opinion of the Court.

terest in the lands described in said purported deed, as an heir at law of said Thomas K. Lalakea, but has no interest therein otherwise than as such heir at law.

The prayer is in effect that the said purported deed be declared absolutely null and void. That Solomon K. Lalakea be required to set forth under oath, a true, full and complete statement of all moneys received by him as rents, issues and profits of said lands, and deposit same in the court for the benefit of the heirs of said Thomas K. Lalakea and for such other and further relief as may be deemed proper in the premises.

The respondent Solomon K. Lalakea demurred to the bill for want of equity, in that it appears from the bill that petitioner has a plain, adequate and complete remedy in the common law. The circuit judge before whom the bill was pending thereupon reserved three questions to this court as follows:

"I. Do the facts alleged and set forth in the amended complaint of petitioner, constitute under the laws of the Territory of Hawaii a case of which a court of equity in this Territory has jurisdiction?

"II. Has the petitioner, under the facts set forth in the amended bill of complaint, a plain, adequate and complete remedy at the common law?

"III. Should the demurrer of respondent, Solomon K. Lalakea, to the amended bill of complaint be sustained?"

The principal contention made by counsel for the petitioner is that her bill sets forth a fraud against which equity will relieve. But we cannot agree with the petitioner that her bill as presented sets forth a case of fraud at all. No doubt she relies on her allegations to the effect that respondent immediately after the death of Thomas K. Lalakea took charge of the papers, documents and writings on the premises occupied by him immediately before his death and the subsequent prov-



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ing and recording of the deed in question, without its having been delivered, as being the facts which charge the respondent with fraud. These are the only facts set forth in the bill which have any tendency toward a charge of fraud and we think they fall short of that effect.

In making allegations of fraud, good pleading requires that the plea should state specifically the inculpatory facts in order that the wrong doing may thereby be made more clearly to appear. By this we do not mean that all the details and circumstances of the transaction as they will appear in evidence must be set forth, but the allegation of fraud should be explicitly and distinctly made and the mode in which the fraud was accomplished pointed out (10 R. C. L., 416). The bill in this case contains no distinct allegation of fraud and we are left to infer from the allegation that respondent took charge of the papers, etc., on the premises occupied by his father; that he in that way fraudulently took possession of the deed, without a specific allegation to that effect. The bill does not measure up to the standard of good pleading in this respect and cannot be upheld on the ground that it charges fraud. It may be that the petitioner can truthfully amend her bill so as to show that respondent fraudulently procured said deed to be executed or fraudulently got possession thereof. But it does not necessarily follow, from a showing that respondent fraudulently procured the deed to be executed or that he fraudulently got possession of it, that petitioner would be entitled to maintain her action in equity.

The jurisdiction in equity, which the several circuit judges are authorized to exercise, is limited and set forth in our statutes as shown by the following excerpts therefrom:

## Opinion of the Court.

"In addition to the jurisdiction in equity otherwise conferred, the several circuit judges shall have original and exclusive jurisdiction of every original process whether by bill, writ, petition or otherwise, in which relief in equity is prayed for, except when a different provision is made" (Sec. 2472 R. L. 1915).

"The several circuit judges may hear and determine in equity, all cases hereinafter mentioned, when the parties have no plain, adequate and complete remedy at the common law, that is to say: \* \* \*

"Suits between copartners, joint tenants and tenants in common, and their legal representatives, with authority to appoint receivers of rents and profits, and apportion and distribute the same to the discharge of incumbrances and liens on the estates or among the cotenants. \* \* \* Suits upon accounts when the nature of the account is such that it cannot be conveniently and properly adjusted and settled in an action at law. \* \* \* Cases of fraud. \* \* \* And shall have full equity jurisdiction according to the usage and practice of courts of equity in all other cases where there is not a plain, adequate and complete remedy at law" (Sec. 2473 R. L. 1915).

The gist of these statutory provisions is that the several circuit judges may exercise their equity jurisdiction when and only when the party has no plain, adequate and complete remedy at law, whether it be a case of fraud or otherwise.

The respondent's main contention is that the bill does not set forth a case of fraud but merely a case of non-delivery of the deed in question and the petitioner having by her bill shown that she is not in possession of the premises in which she claims an interest and that the respondent Solomon K. Lalakea is in possession, claiming to be the owner of the whole of said lands, that therefore she has a plain, adequate and complete remedy by ejectment, a common law remedy and one in which

## Opinion of the Court.

respondent could secure his right to a trial by jury of the central fact involved, viz., the delivery or non-delivery of the deed in question.

The right of the petitioner to maintain an action in ejectment has been questioned by the petitioner because of the fact that under her showing the petitioner and the respondents are cotenants or tenants in common of the lands described in the deed which the petitioner seeks to have declared void.

There can be no question that under the facts set out in petitioner's bill, which for the purpose of demurrer are assumed to be true, the petitioner and the several respondents are cotenants or tenants in common, for if as alleged by her the deed under which the respondent Solomon K. Lalakea claims to be the owner of the whole of said lands was never delivered Thomas K. Lalakea died seized and possessed of said lands and the petitioner and the several respondents upon his death, as his heirs at law, inherited the said lands.

It seems to be well settled that one tenant in common may maintain an action in ejectment against his cotenant where there has been an actual ouster (*Barnitz v. Casey*, 7 Cranch 456), or what is equivalent thereto, demand for possession and refusal (*Nakuaimanu v. Halstead*, 4 Haw. 42, 44), or where the cotenant is in possession of more than his share of the land, or is in receipt of more than his share of the rent (*Adams on Ejectment* 137). See also *Nahinai v. Lai*, 3 Haw. 317; *Liena v. Pahau*, 4 Haw. 475; *Godfrey v. Rowland*, 17 Haw. 577.

But, from the fact that the petitioner in this case could bring an action of ejectment against the respondent who is in possession, it does not necessarily follow that she must pursue that remedy. If the relief which she could obtain at law would not be "plain, adequate and com-

## Opinion of the Court.

plete" she is entitled to pursue her remedy in equity (Sec. 2473 R. L. 1915).

The general rule is that if the petitioner's title is legal in its nature, as it is in this case if she has any title at all, she must be in possession of the premises before she can successfully invoke the aid of equity, since if she is out of possession she may, in an action of ejectment, test the validity of the instrument under which the respondent claims title (*Burton v. Gleason*, 56 Ill. 25; *Smith v. Roney*, 62 So. (Ala.) 753; *Penny v. British & Am. Mtg. Co.*, 132 Ala. 357).

But if the bill sets up additional facts which would require the intervention of a court of equity to administer complete relief the fact that the petitioner could bring an action in ejectment would not preclude her from coming into equity on her whole case even where her title is of a legal nature as it is here (*Sanborn v. Kittredge*, 20 Vt. 632).

It appearing that the petitioner could maintain an action in ejectment and thereby achieve the same result that would follow a decree declaring said deed to be void the question whether her relief at law could be adequate and complete in this case depends on whether the facts entitling her to the relief which she seeks in the nature of an accounting for rents could be alleged and proven by her in the law action of ejectment without a bill of discovery.

If the petitioner is in possession of the facts necessary to maintain an action at law for the recovery of the land and her portion of the mesne profits by way of damages her remedy at law is both adequate and complete, for regardless of the prayer of the bill before us the ultimate object is to recover petitioner's alleged interest in the land described in the deed which she seeks

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to have declared void and to collect her portion of the mesne profits.

It is undoubtedly true that if certain facts essential to the merits of a claim purely legal be exclusively within the knowledge of the party against whom that claim is asserted, he may be required in a court of chancery to disclose those facts and the court being rightly in possession of the case will proceed to determine the whole matter in controversy (*Russell v. Clark*, 7 Cranch 69 at 90).

In this case the bill discloses that the respondent is in possession of twenty-five separate pieces of real estate in which the petitioner claims an interest, and has been in possession thereof for more than two years, using and enjoying the same, collecting and appropriating to his own use the rents, issues and profits thereof to the exclusion of the petitioner and on this branch of the case the prayer is that the respondent be required to set forth under oath a true, full and complete statement of all moneys received by him as rents, issues and profits and deposit the same in court for the benefit of the heirs of said Thomas K. Lalakea.

If the facts set forth constitute a good plea for discovery and accounting the bill shows a case of which equity will take jurisdiction, and having taken jurisdiction will, in order to avoid multiplicity of suits, administer complete relief (*Sanborn v. Kittredge*, 20 Vt. 632; *Smyth v. Ames*, 169 U. S. 466 at 517; *Wilder v. Roland*, 6 Haw. 647 at 650). But a bill in equity for relief in a cause purely legal, upon the ground of discovery, must aver that the facts sought to be discovered are material to the cause of action; that the party has no means of proving them in a court of law; and that the discovery of them by respondent is indispensable as

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proof; and a want of such averments is fatal on demurrer (*Lancey v. Randlett*, 13 Atl. (Md.) 686).

It will be seen that this bill does not allege that the facts sought to be discovered are material to the cause of action or that petitioner has no means of proving them in a court of law, thereby making the discovery of them by the respondent indispensable as proof and we do not think that we can so infer from the allegations which the bill does contain, nor does it appear from the allegations of the bill that the account cannot be conveniently and properly adjusted and settled in an action at law so as to bring the case within the statutory provision hereinabove referred to.

We are of the opinion and hold that the bill as presented does not set forth facts which show the petitioner to be entitled to equitable relief, but if she can truthfully amend her bill so as to come within the principles set forth in this opinion, she should be allowed to do so upon such terms as the court below considers just.

The first reserved question is answered in the negative and the second and third in the affirmative and the court below is instructed to allow the petitioner to amend her bill if she so desires on such terms as the circumstances warrant.

*J. Lightfoot* (Lightfoot & Lightfoot on the brief) for petitioner.

*W. H. Smith* (*W. S. Wise* with him on the brief) for respondent *S. K. Lalakea*.

Syllabus.

M. F. SCOTT AND NETTIE L. SCOTT v. E. N. PILIPO,  
ET AL., AND C. K. AI.

No. 1052.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.  
HON. S. B. KEMP, JUDGE.

ARGUED APRIL 8, 1918.

DECIDED APRIL 23, 1918.

COKE, C. J., QUARLES, J., AND CIRCUIT JUDGE EDINGS IN  
PLACE OF KEMP, J., DISQUALIFIED.

APPEAL AND ERROR—*findings—evidence.*

When the evidence is meagre and unsatisfactory but tends to support the findings of fact made by the trial judge sitting in equity the findings will be sustained on appeal.

TENANCY IN COMMON—*lease—accounting.*

Where one cotenant leases a part of the common property for a term of years the lessee becomes a cotenant and is liable to account for rents and profits to the other cotenants.

SAME—*deeds to whole or part of common property.*

Where one tenant in common makes a deed to the whole of the common property the deed conveys only his own interest and does not convey the interests of his cotenants, but where he attempts to convey a specific portion of the common property by metes and bounds to a stranger the deed is voidable at the election of his cotenants and the grantee does not, where there is no avoidance of the deed, become a cotenant so as to enable him to have the specific portion so conveyed set aside to him and only acquires such proportionate interest in the specific part described by metes and bounds as his grantor had, not in the whole, but in this particular portion.

OPINION OF THE COURT BY QUARLES, J.

In a partition suit one of the plaintiffs presented a supplemental petition asking that the respondent C. K. Ai be made a party defendant and held to account for rents col-

## Opinion of the Court.

lected by him as a cotenant for portions of the common property, whereupon an order requiring said Ai to appear and show cause why he should not be made a party defendant and held to account for rents collected by him was made; on hearing said order to show cause was set aside and from the last named order an interlocutory appeal was granted to this court and on hearing of the same we affirmed the order so appealed from (*Scott v. Pilipo*, 22 Haw. 252), the decision being based upon the insufficiency of the allegations of the proposed supplemental petition to show that the respondent Ai collected such rents as a cotenant, as an adverse claimant or as a stranger. In that decision we held: "While a lessee of one of the owners of undivided lands is a proper party to a suit for partition, the rule does not extend to a stranger who wrongfully collects rents for a portion of the lands and against whom the owners have their remedy at law" (22 Haw. 256). Thereafter said plaintiff presented another supplemental petition to the circuit judge sitting in equity, alleging that C. Ako, the father of the respondent Ai, had purchased a share conveyed to one Akau by Kamale II in the common property and also a leasehold interest therein to all of which the respondent Ai succeeded as sole heir and legatee of the said Ako and as such collected rents for a portion of the common property to the extent of the aggregate sum of \$1210, for which an accounting was asked, but the circuit judge refused to permit the supplemental petition to be filed holding that the plaintiff should sue the respondent at law; on appeal we reversed that ruling (*Scott v. Pilipo*, 23 Haw. 625, 635). At the hearing upon the last named supplemental petition the circuit judge decided that the respondent Ai became a cotenant in the common property and an interlocutory decree was entered requiring him to pay into court the sum of \$1210, with interest thereon, collected by



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him as rents from third parties, subject to the future order of the court. From this interlocutory decree the court allowed an interlocutory appeal, which is now before us.

It is insisted upon behalf of the respondent that the evidence fails to show that he has succeeded to or acquired any interest in the common property other than a leasehold interest under a sub-lease, and, while admitting that he has collected the amount of rent named, \$1210, he alleges that he did so as a subtenant, for which he is not accountable to the tenants in common, and that he is not a cotenant with the other parties who must look to his lessors and not to him. This contention requires an examination of the pleadings and the evidence. The circuit judge made the following findings:

## "Decision.

"Plaintiff's contention briefly stated is that C. K. Ai was, by reason of facts recited in the complaint, one of many co-tenants of a portion of certain hui lands at Holualoa, N. Kona, Hawaii; that said C. K. Ai leased said land for a term of years, collected and appropriated all of the rents to his own use, to the amount of \$1,200.00.

"Plaintiff seeks to have defendant C. K. Ai account to the other co-tenants for the rents so collected and appropriated by him.

"Defendant admits the collection of rents to the amounts claimed, but denies that he was a co-tenant and therefore not required to account.

"From the admissions contained in defendant's answer, and from the evidence adduced at the hearing, I find that on March 29, 1895, Kamale 2 a member of the Hui of Holualoa, holding one share, sold and conveyed to Akau a portion of the said hui lands, and that on August 23, 1894, Kamale 1, also a member of said Hui of Holualoa, holding two shares, leased to said Akau a portion of said hui lands for a period of twenty-two years from January 1, 1895, at an annual rental of \$100. That on February 21, 1896, the said Akau leased both the land purchased from Kamale 2,

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and that leased from Kamale 1, to Harada Kudia and Hakada (Japanese) for twenty years from February 21, 1896, for an annual rental of \$300 and by various assignments the said lease was transferred to the persons from whom the defendant herein collected the rents amounting to the sum of \$1,210.00, being the amount collected at the reduced rental of \$170.00 per annum.

"I find that C. Ako, father of C. K. Ai defendant herein, became the purchaser of both the holdings above referred to at a receiver's sale of the property of Akau, and that the defendant is the sole devisee of said C. Ako, now deceased.

"From the above findings I conclude that the defendant, C. K. Ai, became a co-tenant with the other holders of shares in the said hui, of the lands described in the said lease of February 21, 1896, and that the rents received by him for the use of said lands are the property of the hui and should be paid into court to be disposed of by the further order of the court.

"A decree will be entered in accordance with the above findings."

The petition alleges and the answer of respondent Ai admits that on March 29, 1895, Kamale II was the owner of one share of the 353.25 outstanding shares in the hui aina of Holualoa 1 and 2 and that on that day he deeded to one C. Akau an interest in the hui, described as follows: "All of my coffee patch situated at Holualoa, North Kona, Hawaii, seaward (makai) of the government road running from Kailua to upper Holualoa, and now situated between Kamale senior's coffee on the mountain (mauka) side and that of Moke Apakahelu on the sea (makai) side," and which coffee land is within the boundaries and a part of said hui lands mentioned in said deed. Said Akau by lease dated February 21, 1896, leased twenty-two acres of coffee land to three Japanese for a period of twenty-two years; thereafter by mesne assignments the said lease was transferred to three of the defendants in the partition suit.

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A lease from Kamale I to said C. Akau bearing date August 23, 1894, demised to C. Akau "all the coffee growing on the Hui of Holualoa II on the mauka and makai side of the government road known to be mine" for a term of twenty-two years at an annual rental reserved of \$100 per year. The said partition suit was commenced September 3, 1897, and said C. Akau and the three Japanese lessees under him were made parties defendant thereto. At the time of the deed to Akau from Kamale II said Akau and one C. Ako, the father of respondent Ai, were copartners, and the property conveyed to Akau by deed from Kamale II as well as the lease from Kamale I are shown to have been treated as partnership property by said firm. April 1, 1896, said Akau and Ako executed a mortgage upon certain real and personal property, including the said coffee land and the said lease thereof to said Japanese tenants, to H. Hackfeld & Co., a corporation, to secure a large indebtedness due from Akau and Ako to said corporation. About June 2, 1898, said partnership was dissolved, said Ako transferring to said Akau all his interest in the partnership assets except the interest of said Ako in the said coffee land and lease thereof, to which reservation said Akau assented and said Akau executed a mortgage to the respondent Ai, at the request of the said Ako, of the therefore partnership property to secure the payment of the sum of \$4250, subject to the Hackfeld & Co. mortgage. Later respondent Ai commenced an action in the circuit court of the third circuit to recover upon said indebtedness and attached the property so mortgaged, whereupon Hackfeld & Co. commenced an action to foreclose its mortgage and for an injunction restraining the respondent Ai from proceeding with his attachment suit, in which action a receiver was appointed and the receiver ordered and directed to sell the mortgaged property and out of the

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proceeds thereof to pay the Hackfeld & Co. mortgage and the indebtedness to Ai so far as the proceeds would be sufficient therefor. The record in the Hackfeld & Co. case was introduced in evidence and also oral evidence tending to show what was sold by the receiver. The receiver's report shows that he sold all of the mortgaged property, but it does not show who purchased the interest of Akau in the said coffee land or in the lease thereof made by him. A witness, one Faria, who was present at the receiver's sale, testified that the lease of the Kamale interest was sold at the receiver's sale and that it was purchased by said Ako. It was intended by the lease from Akau to the three Japanese to demise the premises conveyed to the lessor by the deed from Kamale II and the interest leased to Akau by Kamale I. Oral evidence was introduced to show that the coffee land deeded and leased to Akau and by him leased to the Japanese comprises a compact body of twenty-two acres which was identified by parol evidence as the coffee land formerly occupied by the two Kamales. From the record we conclude that there is some evidence authorizing the finding of the circuit judge and which is not overcome by evidence to the contrary, and while the evidence is meagre and unsatisfactory we think the circuit judge correctly found the facts, and that his conclusion was correct, provided the deed from Kamale II to Akau and the lease from Kamale I to him were sufficient to convey interests in the hui land so as to make Akau (of whom Ako was a partner and interested with him) a tenant in common with the other shareholders in the hui. The members of the hui were tenants in common, holding proportionately according to their respective shares (*Pilipo v. Scott*, 21 Haw. 609, 612; *In re Taxes Hui of Kahana*, 21 Haw. 676). Where one tenant in common makes a deed to the whole of the common property the

## Opinion of the Court.

deed conveys only his own interest and does not convey the interests of his cotenants, but where he attempts to convey a specific portion of the common property by metes and bounds to a stranger, the deed is voidable at the election of his cotenants and the grantee does not, where there is no avoidance of the deed, become a cotenant so as to enable him to have the specific portion so conveyed set aside to him and only acquires such proportionate interest in the specific part described by metes and bounds as his grantor had, not in the whole, but in this particular portion.

“A conveyance by metes and bounds to a stranger without the knowledge and consent of the grantor’s cotenants does not make such stranger a cotenant so as to give him the absolute right to have the portion of the entire tract assigned to him. But such a devise or conveyance is valid between the deviser or grantor, and the devisees or grantees, and those claiming by or under them respectively, although inoperative as to the rights of the deviser’s or grantor’s cotenants and those claiming by or under them, who alone can avoid it, and that only if it prejudices them, the effect of the conveyance by the tenant in common of his share by metes and bounds being to pass the deviser’s or grantor’s proportional interest in the part described by the deed; and to entitle the grantee and those claiming under him to the rights of the grantor in the portion thus conveyed” (38 Cyc. 115).

There is no claim or showing that the conveyance to Akau by Kamale II was avoided by his cotenants, hence it passed to Akau only the undivided interest of Kamale II in the land described therein — said twenty-two acres of coffee land. That a portion, if not all, of this land passed to Ako has been found and determined by the circuit judge, whose decision we affirm. When one cotenant leases a portion of the common property his lessee becomes a cotenant with the other owners (*DuRette v. Miller*,

## Opinion of the Court.

60 Ore. 91) and is liable to account for rent to the other cotenants (*Barnum v. Landon*, 25 Conn. 137). The respondent Ai being admitted to be the sole heir and legatee of Ako, and having admitted in his answer that Ako bought the lease to Akau from Kamale I, he became a cotenant in this twenty-two acres, and while not interested in the remainder of the hui lands he was properly held to account for rents received by him from third parties under and by virtue of the lease aforesaid made by Akau. The objection that he was required to pay all the rent received by him into court to be partitioned among those entitled thereto, including that to which he is entitled, without deducting the amounts paid by him to parties claiming to have succeeded to the share owned by Kamale II by purchase subsequent to the deed to Akau does not constitute reversible error as respondent is not prejudiced thereby. It is not shown that respondent was authorized to pay any rent to such subsequent grantees or that they were entitled to all of such rents, and he is in no better position than his lessor, in whose shoes she stands.

The interlocutory decree appealed from should be affirmed, and the money directed to be paid into court should be apportioned among all the cotenants, according to their interests.

The interlocutory decree appealed from is affirmed.

*M. F. Scott* for plaintiffs.

*W. L. Stanley* for respondent Ai.

Syllabus.

MARY MAXWELL BROWN v. JOHN WALKER.

No. 1075.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

HON. C. W. ASHFORD, JUDGE.

ARGUED APRIL 19, 1918.

DECIDED APRIL 26, 1918.

COKE, C. J., QUARLES AND KEMP, JJ.

**EQUITY—decree—certainty.**

A decree in equity foreclosing a mortgage securing a note payable in instalments which sets forth the note *in haec verba*, finds that the first instalment thereof is due and unpaid, and finds that the conditions of the mortgage had been broken by the nonpayment of the note, is not void for uncertainty.

**EXECUTION—equity—jurisdiction.**

An execution may issue upon a decree for money rendered in a suit in equity where the court rendering the decree had jurisdiction of the subject-matter of the suit and of the parties.

**EQUITY—lease—relief from forfeiture—damages.**

Equity having jurisdiction to relieve from a forfeiture for nonpayment of rent, water and sewer rates, the decree properly offset the rental value of the demised premises during the time they were withheld by the lessor from one who had purchased the leasehold at execution sale and tendered the rent due, against the rent in arrears.

**EVIDENCE—impeaching and supporting witness.**

Evidence is not admissible to prove that the reputation of a witness for truth and veracity is good where there has been no attempt to impeach him by showing that his reputation for truth and veracity is bad.

OPINION OF THE COURT BY QUARLES, J.

August 22, 1911, the respondent leased certain premises in Honolulu to one H. Mirikidani for a term of ten years at a rent reserved of \$50 per month payable the first day

## Opinion of the Court.

of each month. February 5, 1917, the leasehold interest conveyed to said lessee by the said lease was sold at execution sale and purchased by one R. C. Smead who received a bill of sale for the same from the sheriff and who on the 14th day of February, 1917, by bill of sale sold and transferred the said leasehold interest to plaintiff. The respondent claiming a forfeiture for nonpayment of rent the plaintiff on March 9, 1917, filed her bill of complaint in equity seeking to have the said forfeiture nullified, asking to be permitted to pay the rent in arrears which she alleged to be three months' rent amounting to \$150, and seeking to restrain the respondent from enforcing or attempting to enforce a forfeiture of the leasehold *pendente lite* and for such other relief as the plaintiff in equity may be entitled. The plaintiff's bill, after alleging the other necessary probative facts, alleges: "That on February 14, 1917, the respondent reentered the premises covered by Exhibit A (the lease) and declared that the leasehold estate thereby created was forfeited for nonpayment of rent." The answer of respondent admits the execution of the lease, denies the reentry and alleged forfeiture in February, 1917, but alleges a reentry and forfeiture of said leasehold by respondent in March, 1916, and alleges an occupancy of the premises by said Mirikidani since March, 1916, as a tenant at will of respondent. The bill alleges and the answer admits a tender on behalf of the plaintiff to the respondent of the sum of \$150 rent in arrears made on or about the 23d day of February, 1917. The answer alleges that the plaintiff did not succeed to the said leasehold, that it was terminated in March, 1916, and that the plaintiff has no interest in the premises. On hearing the trial judge, sitting at chambers in equity, found that on February 14, 1917, there was due to the respondent the sum of \$150 rent; that respondent has



## Opinion of the Court.

withheld from the plaintiff the demised premises since the 14th day of February, 1917; that the rental value of the premises per month, plus the water rates, is \$75; that plaintiff is entitled to relief against the pretended or attempted forfeiture, and a decree was entered in accordance with the findings decreeing the respondent entitled to rent, water and sewer rates paid by him and which the lessee was to pay under the terms of the lease, in the sum of \$255.75, and decreeing the plaintiff entitled to damages in the sum of \$216.50 up to and including November 5, 1917, and that the forfeiture be annulled and the plaintiff have possession of the leasehold premises.

From the decree the respondent has appealed assigning a number of errors which we deem unnecessary to treat *seriatim*. The plaintiff introduced in evidence the record in a mortgage foreclosure suit instituted by her June 2, 1916, against said Mirikidani in which she obtained a decree of foreclosure, and after sale of the mortgaged property and application of the proceeds of the sale to the costs, expenses and mortgage debt, she was awarded a decree for a deficiency in the sum of \$1696.60, and which was entered. Upon said deficiency decree an execution was issued but same was thereafter returned unsatisfied after which an *alias* execution issued on the deficiency decree and the same was levied upon the said leasehold interest which was sold at execution sale and purchased by said Smead who sold and assigned to the plaintiff.

One of the principal errors assigned and upon which others depend is that the decree of foreclosure mentioned was and is void for the reason that the amount of the mortgage debt was not definitely found or fixed therein. It is admitted that the court rendering the decree had jurisdiction of the subject-matter and of the parties. We have examined the decree and while it is not in proper

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form it does fix the amount of the indebtedness for which a foreclosure was decreed. It sets forth *in haec verba* a copy of the note for \$2850 payable by its terms as follows: May 31, 1916, \$250 with interest at six per cent. per annum; May 31, 1917, and each year following not less than \$200 and interest as aforesaid until the whole amount with interest shall have been paid. The court found in the decree of foreclosure that the first payment had not been made but defaulted and by reason of the nonpayment of the note the conditions of the mortgage were thereby broken and decreed a foreclosure. The defendant did not appear, although summoned, and was defaulted. The deficiency judgment was properly entered. It will be noticed that the attack upon the decree of foreclosure is collateral but the respondent correctly claims that if the decree of foreclosure is void for uncertainty, as he claims it to be, he may attack it collaterally. We do not think the decree is void and hold it to be good against a collateral attack. A decree in equity foreclosing a mortgage securing a note payable in instalments which sets forth the note *in haec verba*, finds that the first instalment thereon payable is past due and unpaid, and finds that the conditions of the mortgage have been broken by the nonpayment of the note, is not void for uncertainty. The decree of foreclosure was for the whole amount of the mortgage note with interest thereon.

It is also contended by respondent that the execution under which the leasehold was sold was void and unauthorized and that an execution cannot legally issue upon a decree in equity. If this contention is correct the result would be that in every foreclosure case, where the mortgagor obtains a decree for a deficiency remaining after exhausting his security, he would have to bring an action at law upon the deficiency decree before he could enforce

## Opinion of the Court.

it. We hold otherwise. An execution may issue upon a decree for money rendered in a suit in equity where the court rendering the decree has jurisdiction of the subject-matter and of the parties.

The second assignment of error is that the court erred in holding and deciding that the respondent had not declared a forfeiture in March, 1916. The correctness of this assignment is to be decided upon the evidence. In March, 1916, the lessee Mirikidani was in arrears of rent two months or to the extent of \$100 for the months of February and March. While testifying in his own behalf the respondent stated that on March 18, 1916, he went to see Mirikidani and told him the lease was *pau* and that he must get out and that Mirikidani said he would do so but failed to do so and that he (respondent) saw Mirikidani afterwards from time to time about rent that was due and unpaid and later asked Mirikidani why he did not get out, who gave the excuse that he could not get another house. Mirikidani testified that the respondent never informed him that the lease was terminated until after the plaintiff purchased the lease; that after the leasehold was sold and purchased by the plaintiff he received a writing — a paper — from plaintiff and took it to the respondent who examined it and said: "Never mind about this paper, you remain here under the old lease; you will have no *pilikia*, no trouble." Mirikidani testified that this conversation with the respondent was about two weeks after the plaintiff purchased the lease. He also testified that the respondent received rent from him two or three times after the plaintiff bought the lease and then refused to accept further rent and took his copy of the lease and his receipts for rent and asked him to go to the office of Mr. Peters (counsel for respondent) and tell him that the lease was *pau* or ended; that respondent then said to

## Opinion of the Court.

witness that the lease is *pau*; that this conversation was about two weeks after plaintiff had purchased the lease and that respondent had not told him (Mirikidani) that the lease was terminated or *pau* before that time; that he went to Mr. Peters' office after this suit was brought, at the request of respondent, and told Mr. Peters that the lease was *pau*; that he (witness) then knew that this suit had been brought. The receipts for rent were presented at the hearing by the respondent. There was competent evidence to show that the rental value of the property is \$75 per month introduced without objection on the part of respondent. The evidence tending to show that the respondent reentered and terminated the lease on March 18, 1916, consists alone of respondent's statement and is flatly contradicted by Mirikidani. The evidence tending to show when respondent claimed the forfeiture and attempted to terminate the lease is contradictory and depends upon the direct evidence of the respondent on the one side and the witness Mirikidani on the other with the circumstances favoring the testimony of the latter. We think that on this point the trial judge was justified in finding the facts in favor of the plaintiff. An inspection of the receipts for rent which were introduced in evidence shows that the lessor did not require the prompt payment of rent on the day the same was due, the first of each month, but the rent was generally paid after the first and sometimes towards the close of the month or even after the expiration of the month. According to the evidence of Mirikidani the respondent did not claim a forfeiture of the lease for nonpayment of rent until after the plaintiff had acquired the leasehold, which was in February, 1917, when respondent told him the lease was *pau*. The actions of the respondent and the circumstances corroborate the testimony of Mirikidani. He, as original lessee, had sublet a por-

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tion of the premises, one of the two storerooms, at a rental of \$35 per month, and continued to collect this rent, and with \$15 additional (for what appears to be half of the demised premises) paid the rent under the lease until after plaintiff had bought the leasehold when respondent commenced to collect the \$35 per month from the subtenant and \$25 from Mirikidani, that is, since February 14, 1917.

One of the errors assigned is that the plaintiff is not entitled to any reduction from rents, water and sewer rates that were in arrears by the withholding of the premises by respondent for the reason that the prayer of the bill did not ask for such relief. There was a general prayer in the bill "that other relief be afforded the petitioner to which in equity she may be entitled." There was no allegation in the bill as to the rental value of the demised premises but evidence showing the rental value of the same to be \$75 per month was introduced without objection. Under all of the proven circumstances the rent reserved, which was in arrears, and charges for water and sewer rates paid by respondent, were properly reduced by the rental value of the demised premises during the time they were withheld by respondent from the plaintiff. Equity having jurisdiction to relieve from a forfeiture for nonpayment of rent reserved and water and sewer rates the decree properly offset the rental value of the demised premises during the time they were withheld by the lessor from one who had purchased the leasehold at an execution sale and tendered the rent due.

One of the assignments of error is that the court refused to admit evidence of witnesses to prove that the respondent's reputation for truth and veracity is good. There had been no attempt to impeach the respondent by showing that his reputation for truth and veracity was

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bad, hence evidence to show that it was good was properly rejected.

We have examined the other assignments of error and find none of them sustained by the record and find no reversible error therein.

The decree appealed from is affirmed.

*J. T. DeBolt* for plaintiff.

*E. C. Peters* for respondent.

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DAVID K. KAHAULELIO *v.* BEKE IHIHI AND  
KIN CHOY.

No. 1061.

EXCEPTIONS FROM CIRCUIT COURT, SECOND CIRCUIT.  
HON. W. S. EDINGS, JUDGE.

SUBMITTED MARCH 19, 1918.

DECIDED MAY 3, 1918.

COKE, C. J., QUARLES AND KEMP, JJ.

DEEDS—*construction—repugnant clauses.*

It is a rule of law that in the construction of deeds if two clauses therein are so repugnant that they both cannot stand the first will be sustained and the latter rejected.

SAME—*same—intent.*

While the intent and not the words is the principal thing to be regarded yet in searching for the intent we are hedged about by certain positive rules of law which must be heeded. One of such rules is that a grantor cannot destroy his own grant however much he may modify it or load it with conditions. Having once granted an estate in his deed no subsequent clause, even in the same deed, can operate to nullify it.

## Opinion of the Court.

## OPINION OF THE COURT BY COKE, C. J.

An action in ejectment was instituted by the plaintiff, appellant, against the defendants, appellees, for the recovery of a lot of land situated at Lahaina, Island of Maui. The parties agreed to the facts involved and the case was submitted to the court jury waived. The plaintiff claimed title to the land in question as the sole heir at law of one Isaac Ihihi, the grantee named in a certain deed executed and delivered to him by defendant Beke Ihihi, as grantor. It appears that Isaac was a nephew of Beke. The deed under which the plaintiff claims was in the Hawaiian language, but an agreed English translation was placed in evidence and reads as follows:

"Know all men by these presents, I, Beke Ihihi, of Lahaina, County of Maui, for One Dollar (\$1.00) by me received from Isaac Ihihi, my beloved nephew, of the City and County of Honolulu, Territory of Hawaii, and also for my love for him; hereby sell and convey unto him and to his heirs and assigns forever, my houselot situate at Halakaa, Lahaina, Maui, adjoining the mauka side of the Government Road, conveyed by J. Kaeo and Lahilahi to Ihihi on the 27th day of April, 1855, recorded in the Registry Office in Liber 35, page 216. And conveyed by R. Armstrong to Ihihi on the 5th day of April, 1859, and recorded in the Registry Office on the 17th day of May 1859, in Liber 11, page 204. And conveyed by P. Keikialoha to Beke on the 3rd day of January, 1880, and recorded in the Registry Office in Book 63, page 248.

"And all instruments heretofore made by me, testamentary or otherwise, are by this instrument made of no effect.

"Provided, however, not until after my death shall this deed be of effect and if Isaac should die before then this land shall revert to me and this instrument be of no effect.

"In witness whereof I have set my hand this 15th day of November, 1913.

"(Signed) Beke Ihihi.

"In presence of

"(Signed) S. K. Kamaiopili."

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Isaac Ihihi, the grantee, died on or about January 1, 1916. Beke, the grantor and defendant herein, still survives. The defendant Kin Choy is the tenant of Beke. The court below was required to construe the deed in question which it proceeded to do in the manner appearing from the following excerpt from the court's decision:

"The only question before the court is that concerning the construction of the deed. It is claimed by the plaintiff that the deed conveys the land to Isaac Ihihi in fee simple absolute, and that the proviso above referred to does not lessen the estate conveyed.

"The defendants claim that the deed created an estate *in future* and the grantee having predeceased the grantor no estate passes to the heirs of the grantee.

"The court is of the opinion that the deed conveyed to Isaac only an estate *in future* in fee contingent upon his surviving the grantor. During the life of the grantor, Isaac had no present interest in the estate. His interest was merely an expectant interest based on the contingency that he survived the grantor. Having died before the grantor, his interest became extinguished and his heirs cannot inherit under the deed.

"This court does not believe that this is a case where there is a manifest repugnance between the premise and the habendum clause of the deed, for the reason that the deed does not contain any habendum clause.

"The fee still remains in the said defendant Beke Ihihi and she and her tenants are entitled to remain in possession of the premises."

Thereupon judgment was entered for the defendants and against the plaintiff. From the decision and judgment the plaintiff comes to this court on exceptions. The entire controversy turns upon a construction of the deed. The plaintiff urges that the clause in the deed which provided that not until after the death of the grantor should the deed be of effect and that if Isaac should predecease the grantor the land should revert to her and the instru-



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ment be of no effect is totally repugnant to the premises or granting clause in the deed, which purports to convey to Isaac an estate in fee simple absolute. The position of the defendant, Beke, is that the deed conveyed to Isaac only a contingent estate *in futuro*.

It is important to bear in mind that while the premises gave to Isaac an estate in fee simple absolute the later clause attempted to limit the estate granted to a mere contingent interest. If effect is given to the last clause the deed would convey to Isaac no present vested interest in the property. The nature of the estate conveyed to him would be akin to a contingent remainder, although there was no intervening estate which is usually contemplated when an estate in remainder is created. But be that as it may, Isaac's estate would be entirely contingent upon his surviving Beke and of course whatever estate he acquired would be *in futuro*. An estate created to commence *in futuro* without an intervening estate could not exist at common law because of the necessity of actual livery of seizin which always operated *in presenti*. It may be here noted, however, that the courts of this Territory have digressed in numerous instances from the rules of the common law. For instance, neither an estate tail nor a fee simple conditional can exist in these islands although both were recognized at common law. See *Rooke v. Queen's Hospital*, 12 Haw. 375; *Kinney v. Oahu Sugar Co.*, 23 Haw. 747, 759. On the other hand, estates *in futuro* were not permissible under the common law for the reasons above noted, yet the contrary rule prevails here, as we believe it does in most, if not all, of the States. *Puukaiakea v. Hiaa*, 5 Haw. 484; *Keliilihune v. Vierra*, 13 Haw. 28. See also *Branca v. Makuakane*, 13 Haw. 499, 505, 506. An estate in remainder, recognized here as well as at common law, is defined as an estate limited to take effect and be

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enjoyed after another estate is determined. A contingent remainder is where the estate in remainder is limited to take effect either to a dubious and uncertain person or upon a dubious and uncertain event. So we have in the present case, if the last clause in the deed is to prevail, an estate granted to Isaac which is dependent entirely upon an uncertain event, that is, whether or not Isaac survives the grantor. If he does not so survive then all rights acquired by him under the deed are extinguished. There being, however, no intermediate estate interlaying between that of the grantor and the grantee the fee in the meantime would remain in Beke, a situation in direct conflict with the premises which granted to Isaac a present estate in the fee simple. Having thus distinguished between the estates attempted to be conveyed by the two divergent clauses in the deed we are brought to a construction of the deed as a whole and are required to determine which of the two clauses, palpably repugnant to each other, shall control.

It is a rule of law that in the construction of deeds if two clauses therein are so repugnant that they both cannot stand the first will be sustained and the latter rejected. It will be noted that the deed under consideration contained no habendum. The premises granting the fee simple to Isaac were followed by a clause declaring of no effect all instruments testamentary or otherwise theretofore made by the grantor and then the clause which provided that "not until after my death shall this deed be of effect and if Isaac should die before then this land shall revert to me and this instrument be of no effect." It is plain that the estate granted by this clause in the deed was not only *in futuro*, but dependent upon a contingency, and of course was vastly inferior to the estate in fee granted by the first clause in the deed. "Terms in a deed which vest a fee in

## Opinion of the Court.

the first taker are not controlled by other parts of the instrument showing an intention to give a less estate." *Palmer v. Cook*, 159 Ill., 300; *Winter v. Gorsuch*, 51 Md., 180. This court has announced the rule that "words of grant are not defeated by irreconcilable conditions afterwards expressed or by limitations in the habendum." *Simerson v. Simerson*, 20 Haw. 57, 60. In the *Simerson* case the dissenting opinion of Mr. Justice Perry was based mainly upon the theory that the language used in the premises was ambiguous and therefore the habendum clause should be employed to explain the language and remove the ambiguity. The premises in the deed now under consideration contain no ambiguity whatsoever. No better or clearer language could be used to express a grant conveying an estate in fee simple absolute.

It is a general rule that while the last clause in a will must prevail if it conflicts with a preceding one, in the case of a deed the rule is reversed, for in the latter case the first clause must prevail. Of course it should be borne in mind that the intent and not the words is the principal thing to be regarded, but in searching for the intent we are hedged about by certain positive rules of law which must be heeded. One of such rules is that a grantor cannot destroy his own grant, however much he may modify it or load it with conditions. Having once granted an estate in his deed no subsequent clause even in the same deed can operate to nullify it. 11 Bacon's Ab. 665; Shep. Touch. 79, 102. We do not find that this rule has ever been disregarded or even seriously questioned by courts. *Simerson v. Simerson*, *supra*, 60, 61. It is a well recognized rule that having once granted an estate in a deed the grantor cannot restrict or nullify it by a subsequent clause. *Gaddes v. Pawtucket Institution for Savings*, 27 Am. & Eng. Ann. Cas. 407, 411. See also *Carllee v. Ellesberry*, 101 S. W. 407; 16 Am. Dig., Century ed. 437.

## Syllabus.

The last clause in the deed being entirely repugnant to the premises we are bound to follow the rules of law applicable to the construction of deeds and hold that the first clause shall stand and the latter be disregarded.

The exceptions are sustained. The judgment of the court below is reversed and the cause remanded for further proceedings consistent with this opinion.

*Lightfoot & Lightfoot* for plaintiff.

*Mott-Smith & Lindsay* for defendants.

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IN THE MATTER OF THE PETITION OF MORRIS ROSENBLDT, TRUSTEE FOR EVA McCLELLAN, LILY NAUELE BRANDT AND OTILLA ROBINSON TO REGISTER TITLE TO CERTAIN LANDS SITUATE IN HONOLULU, CITY AND COUNTY OF HONOLULU, TERRITORY OF HAWAII.

No. 1063.

RESERVED QUESTIONS FROM LAND COURT.

HON. S. B. KEMP, JUDGE.

ARGUED APRIL 29, 1918.

DECIDED MAY 6, 1918.

COKE, C. J., QUARLES AND KEMP, JJ.

DEEDS—*inoperative clauses.*

Where the granting clause conveys to grantee a title in fee simple phrases therein expressing the motive of the grantor for making the deed are inoperative and do not limit the grant.

SAME—*words and phrases—"forever."*

The absence of the word "forever" from the granting clause of a deed does not limit the grant to a life estate; the word was of

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no particular signification at common law and we have no statute requiring its use.

**SAME—*same—heirs.***

The word "heirs" is not necessary in a deed in order to convey the fee to the grantee.

**SAME—*repugnancy between premises and habendum.***

Where the granting clause of a deed conveys the title in fee to the grantee and the habendum in terms limits it to an estate for life with remainder to the lawfully begotten children of the grantee there is a repugnancy between the granting clause and the habendum, the former controlling to the exclusion of the latter, the grantee taking the fee simple title under the deed.

**COURTS—*land court—jurisdiction.***

The land court is a court of limited jurisdiction created for the special purpose of carrying into effect the Torrens title scheme, derives all its powers from the statute relating to it and can exercise no power not found within those statutes.

**SAME—*same—registering title between answering contestants.***

The land court is given power to register the title of the applicant only and has no power to register the title of answering contestants between whom exist a diversity of interests.

OPINION OF THE COURT BY QUARLES, J.

July 23, 1863, William Wond made a deed of gift to his daughter Elizabeth Wond, then about to be married, conveying to her certain described premises in Honolulu, which deed, omitting the description, is as follows:

"Know all men by these presents that I William Wond of Honolulu Hawaiian Islands, in consideration of the natural love and affection which I have and bear for my beloved daughter Elizabeth Wond, also of Honolulu H. I. and also for other good causes and considerations, I have given, granted and confirmed and by these presents do give grant and confirm unto the said Elizabeth Wond, as a wedding gift, and also for the better support, maintenance and livelihood of the said Elizabeth Wond her lawfully begotten children their heirs and assigns that certain tract or parcel of land situated in the City of

## Opinion of the Court.

Honolulu aforesaid and described as follows, viz.: \* \* \*

“And the reversion and reversions, remainder and remainders, rents issues and profits thereof and all the estate right title interest, property, claim and demand whatsoever held by me the said William Wond, of, in and to the said premises and of, in and to every part and parcel thereof with the appurtenances.

“To have and to hold all and singular the premises hereby granted and confirmed or mentioned with all the appurtenances unto the said Elizabeth Wond her lawfully begotten children their heirs and assigns to their only proper use and behoof forever.

“This deed of gift, nevertheless, the said Elizabeth Wond shall not mortgage, sell, give, grant or otherwise alienate or dispose of any portion parcel or part of said land nor of any portion parcel or part of the premises, hereditaments and appurtenances thereto belonging to any person or persons or in any way or manner whatsoever. That in the event of the death of the said Elizabeth Wond without leaving lawfully begotten children then the said land premises hereditaments and appurtenances thereunto belonging shall revert to me the said William Wond for my whole and sole use disposal and benefit. And in the event of my death then the said land with the premises hereditaments and appurtenances thereunto belonging shall revert to my beloved daughter Mary Ann Wond, her children their heirs and assigns forever.—In the event of Mary Ann Wond’s death without leaving lawfully begotten issue then the said land premises hereditaments and appurtenances shall revert to my next living child and so down in succession according to age, the oldest taking the priority.

“And I the said William Wond for myself my heirs and assigns do covenant promise and agree to and with my said beloved daughter Elizabeth Wond her lawfully begotten children their heirs and assigns shall and may lawfully from time to time and at all times hereafter peacefully and quietly have, hold, occupy, possess and enjoy the said land and premises hereby granted without the lawful hindrance or molestation of the said William Wond his heirs and assigns or of any other person or persons

## Opinion of the Court.

whatsoever by or with his or their act, consent, privity or procurement.

"In witness whereof I have hereunto set my hand and seal this 23rd day of July One Thousand Eight Hundred and Sixty-three."

Elizabeth married Isaac Hart soon after the execution of the deed and by him had nine lawfully begotten children, one of whom died in infancy while both parents were living, and another, Edith Kamaka Aholo, died intestate, unmarried and without issue, after the death of her father. Isaac Hart died in April, 1881, and while a widow Elizabeth had three children, one born in 1884, one in 1886 and the other in 1889, of whom Philip Meeawa was the father. Later Elizabeth and Philip Meeawa were married. Elizabeth died intestate April 13, 1912, leaving surviving her seven lawfully begotten children and two of the three born out of wedlock, one of them having died in 1909, intestate, married, and leaving an infant son, Joseph Ohia, who died March 28, 1910.

The petitioner, Rosenbledt, as trustee for three of the lawfully begotten children, filed his petition in the land court in which he claims title to an undivided three-sevenths of the lands conveyed by the deed and seeks to have the title to such undivided interests registered. The respondents Muhlendorf, Jaeger and Wodehouse, as trustees under the Will of Bathsheba M. Allen, deceased, have appeared and answered and claim to have acquired title to an undivided 5110/9072 interest in said land. The respondent, T. Brandt, appeared, answered the said petition, and claims title to an undivided 476/9072 interest in and to the said land, a part of which, a 119/9072 interest, he claims to have acquired by deed from Lena K. Dykes, but which she in her answer denies and claims to own the same; a further part of said 476/9072 interest in said land, to wit, a 119/9072 interest, Brandt claims

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to have acquired by deed from Minnie Makinney, which claim the said trustees in their answer deny and in their said answer allege that the title to said fractional interest is now vested in them. All of the parties claim from a common source, namely, the said deed from William Wond to Elizabeth Wond. The petitioner and some of the respondents claim through lawfully begotten children of Elizabeth, while other interests are claimed by some of the parties respondent through children not lawfully begotten. It does not appear that the interests which might be claimed through the latter class of children are represented in the proceedings in the land court.

The judge of the land court being in doubt as to the rules of law applicable to points which have arisen reserved to this court the following questions:

"1. Did the said deed give to the said Elizabeth Wond a life estate, with a vested remainder to her lawfully begotten children?

"2. Did the said deed give to the said Elizabeth Wond a life estate, with a contingent remainder to such of her lawfully begotten children as should survive her?

"3. Did the said deed give to the said Elizabeth Wond an estate in fee simple in said land?

"4. Has the land court the power to register in this proceeding the titles of respondents to such undivided interests as may be shown therein to be owned by the said respondents or any of them?

"5. If the fourth question is answered in the negative, has this court the power in this proceeding to find and decree, as between the several respondents herein, what title or interest in the land is vested in them or either of them?"

The solution of these questions calls for a construction of the deed and a determination of its legal effect. It is claimed on behalf of the petitioner and also on behalf of the respondents who have appeared in this court, among whom exist a diversity of interests, that the deed conveyed



## Opinion of the Court.

to Elizabeth a life estate only with remainder in fee to her after-born lawfully begotten children, the first of whom took a vested remainder in fee after which it was a case of open and let in upon the birth of each succeeding lawfully begotten child. After much consideration we are unable to accept this contention as correct. The later expressions in the deed evince the intention of the grantor to create an estate tail but this intent is rebutted by the absence of the technical words limiting the fee to the "heirs of the body" of the grantee or to any particular heirs of her body, such words being necessary to create an estate tail at common law which required both words of inheritance and words of procreation in order to create an estate tail. "If, therefore, either the words of inheritance, or words of procreation be omitted, albeit the others are inserted in the grant, this will not make an estate tail. As, if the grant be to a man and *his heirs of his body*, to a man and his seed, to a man and his children, or offspring: All these are only estates for life, there wanting the words of inheritance, his heirs" (2 Blackstone Com. 114, 115; 1 Washburn Real Prop. Sec. 147), as well as to create a fee simple conditional. But an estate in fee simple conditional cannot exist in this jurisdiction, the common law rule recognizing it being rejected (*Rooke v. Queen's Hospital*, 12 Haw. 375), and estates tail have also been rejected (*Rooke v. Queen's Hospital*, *supra*; *Nahaolelua v. Heen*, 20 Haw. 372; *Boeynaems v. Ah Leong*, 21 Haw. 699; *Kinney v. Oahu Sugar Co.*, 23 Haw. 747).

If we eliminate from the premises or granting clause the words "as a wedding gift, and also for the better support, maintenance and livelihood of the said Elizabeth Wond her lawfully begotten children their heirs and assigns" we find in the premises an absolute grant in fee to Elizabeth with the usual words of inheritance and the

## Opinion of the Court.

word, forever, omitted. The words just quoted are no part of the grant but are descriptive of the motive or purpose of the grantor and neither add to nor limit the grant (*Magoon v. Lord-Young Engineering Co.*, 22 Haw. 327, 336; *Mauzy v. Mauzy*, 79 Va. 537). The absence of the word "forever" from the granting clause of a deed does not limit the grant to a life estate as the word was of no particular significance at common law (2 Blackstone Com. 107; 1 Washburn Real Prop.—6 ed.—Sec. 147), and we have no statute requiring its use. Eliminating the words expressive of the motive or purpose of the grantor in making the deed from the premises or granting clause, the words following the description of the property conveyed, to wit: "And the reversion and reversions, remainder and remainders, rents issues and profits thereof and all the estate right title interest, property, claim and demand whatsoever held by me the said William Wond, of, in and to the said premises, and of, in and to every part and parcel thereof with the appurtenances" evince the intent of the grantor to convey all of the estate which he owned in the property, the title in fee, to the grantee. He retained nothing (*Vaughn v. Stuzaker*, 16 Ind. 338). The word "heirs," while necessary at common law in order to vest by deed the title in fee, is not necessary, and never has been, in Hawaii (*Thurston v. Allen*, 8 Haw. 392; *Hemen v. Kamakaia*, 10 Haw. 547; *Branca v. Makuakane*, 13 Haw. 499; *Kaleialii v. Sullivan*, 23 Haw. 38, affirmed on appeal, 242 Fed. 466; *Keanu v. Kaohi*, 14 Haw. 142).

The death of both the grantor and the grantee, the latter leaving surviving her lawfully begotten children, narrows the determination to an elucidation of what estate the children of the grantee, whether lawfully begotten or otherwise, took in the property conveyed by the deed. The inhibition against alienation found in the clause following

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the habendum is illegal and void (*Simerson v. Simerson*, 20 Haw. 57) and may be regarded as out of the deed. Eliminating from the deed all of the inoperative parts we find the premises granting the fee simple title to the grantee and the habendum attempting to limit the grant to a life estate in the grantee with remainder in fee to her lawfully begotten children, their heirs and assigns. There is an absolute conflict and utter repugnancy between the granting clause and the habendum. We need not go further than our own decisions to determine the effect of the deed under such conditions. Owing to repugnancy between them the premises or granting clause controls (*Simerson v. Simerson, supra*), and all later provisions that are repugnant to the granting clause are inoperative (*Simerson v. Simerson, supra*; *Kaleialii v. Sullivan, supra*; *Kahaulelio v. Ihiki, ante*, p. 292.)

The petitioner insists that under the ruling in *Booth v. Baker*, 10 Haw. 543, and in *Nahaolelua v. Heen, supra*, that the grantee, Elizabeth Wond, took only a life estate with remainder in fee in her after-born lawfully begotten children. Those decisions we do not regard as in point but as distinguishable from the case at bar. In *Booth v. Baker* the provision in a will that Elizabeth "on attaining her majority to have all the benefits of the land during her lifetime, but she is not to dispose of any of the real or personal property to any one, and if she should have a child during her lifetime then all my property, real and personal, shall go to such child" was construed as vesting in Elizabeth a life estate and in her unborn child or children a contingent remainder which upon the birth of the first child ceased to be a contingent remainder in the first born child subject to open and let in after-born children. In that case a will was being construed where, by established rules of construction, in case of conflicting provisions the later control, whereas in the case at bar we

## Opinion of the Court.

are construing a deed where the rule is reversed and in case of conflicting provisions the first controls. We must also bear in mind that in order to create an estate or to limit an estate devised technical words required in a deed are not always necessary in a will, greater latitude being allowed in case of the latter (2 Blackstone Com. 115). In *Nahaolehua v. Heen*, *supra*, the premises or granting clause of a deed conveyed to the grantee and "to the heirs of her body" and the habendum read "To have and to hold \* \* \* to the party of the second part, and the heirs of her body forever." Both the granting clause and the habendum were consistent, while a subsequent clause read: "In special trust for the use and benefit of her said son\* \* \* and such other child or children as may hereafter be born to her, and his or their heirs and assigns forever as he or they shall arrive at the age of legal majority." The later clause was held to be repugnant to the granting clause and to the habendum and inoperative and that the grantee took a life estate with vested remainder in fee simple in her children. That case is unlike the case at bar in that the granting clause and habendum were not repugnant to each other but were in agreement, while here there is conflict and repugnancy between the granting clause and the habendum, and in this event the former controls and the latter must give way. The clause against alienation with the subsequent language evinces the intent of the grantor to create an estate tail carrying a life estate in the first taker. Under these circumstances we must hold that the deed vested the fee simple title in the grantee and that her children take under her by our statutes of descent. We follow the decision in *Kinney v. Oahu Sugar Co.*, *supra*, wherein it is said: "In short, in such a case as this, a holding that the first taker shall have an estate in fee simple will go as near as may be under the law toward effectuating the futile intent to create an estate tail."

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We now consider the fourth and fifth reserved questions. Section 3133 R. L. as amended establishes a land court with exclusive jurisdiction of all applications to register title to land, makes the court a court of record with a seal and authorizes it to make and prescribe rules of practice and forms to be used in proceedings before it. Later sections authorize appeals to this court upon points of law and to the circuit courts sitting with a jury upon questions of fact. In case of appeal to the circuit court sitting with a jury the issues are to be framed in the land court within thirty days after the date of the judgment from which the appeal is taken. The owner of any estate or interest in land may apply to have his title registered. The matters which the petition shall contain, the contents of notices and the manner of giving them, as well as other matters of practice, are prescribed and the court given power to make other regulations. It is provided that any person claiming an interest, whether named in the notice or not, may appear, answer and state all objections to the application and set forth the interest of the answering party. The court is given power to make all orders and judgments, to issue writs of possession and other process and to take all other steps necessary for the promotion of justice in matters pending before it and to carry into full effect all powers which are given to it by the laws of the Territory. The court is authorized to dismiss the application of an applicant for registration of absolute title when the court finds that he has not a proper title for registration without prejudice and may permit the applicant to amend his application before final decree. The court is, by the terms of the statute, to decree and register absolute titles which bind all of the world, including the Territory, with certain exceptions, which are subject to be reopened only on petition for review upon the ground of fraud within one year. The court is

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also by the terms of the statute authorized to register possessory titles binding all claims except those subsisting or capable or arising at the time of registration. Qualified titles, those subject to certain reservations, may be registered. The court may remove clouds on titles and may find and decree in whom the title to any interest, legal or equitable, in land is vested, whether in the applicant or in any other person. We have been unable to find any provision in the land court act which gives the court power to register title in any one other than the applicant, or to register title to a moiety in favor of one or the other of conflicting claimants thereto who answer the petition of the applicant and claim adversely one to the other, and we have been pointed to none and counsel say that they can point to none. The power given is to determine between the applicant and parties who answer and contest the applicant's claim to title, but not to determine between conflicting answering defendants as to their respective rights. The land court is a court of limited jurisdiction, created for a special purpose, that of carrying into effect what is known as the Torrens title scheme, derives all of its power from the statutes relating to it, and can exercise no power not found within those statutes.

It is urged upon us that expediency, convenience and the avoidance of cost of other applications on the part of the respective respondents in this case should be considered in answering the last two questions reserved. We are of opinion that we are not at liberty to consider such matters and the questions must be answered alone from the terms of the statutes relating to the land court. Many illustrations by way of hypothecated cases might be given to show the danger of holding that the land court has power to register title to any part of the land involved or interest therein in any party who may appear and answer

## Opinion of the Court.

the applicant's petition and claim title to any particular interest in such property. For instance, A files an application to register an undivided one-half interest in certain land. The only notice that is published to the world is that of the filing of applicant's petition. B, who owns an undivided one-half interest in this same land, sees the notice but is satisfied that A owns the undivided one-half interest which he claims so he does not appear and answer or contest the claim of A. C appears, answers and claims to own an undivided one-half interest in the same land and asks the court to decree that he owns an undivided one-half interest in said land. Upon hearing the showing made is sufficient to justify the land court in holding that A owns an undivided one-half interest in the land and to register his title thereto and to determine and decree that C owns the other undivided one-half interest in said land, whereas, if B had appeared and answered and brought evidence within his power to bring the court would have been justified only in holding that A owned an undivided one-half interest and B the other undivided one-half interest in the land involved.

We answer the first, second, fourth and fifth reserved questions in the negative, and the third question reserved in the affirmative.

*E. C. Peters* for petitioner.

*M. B. Henshaw* (with whom *Henry Holmes* and *C. H. Olson* appear on the brief) and *B. L. Marr* for respondents.

## Syllabus.

W. J. WEST, ON BEHALF OF HIMSELF AND ALL OTHER TAXPAYERS OF THE COUNTY OF HAWAII, SIMILARLY SITUATED, *v.* THE COUNTY OF HAWAII, SCHUMAN CARRIAGE COMPANY, LIMITED, AND SAMUEL M. SPENCER, AUDITOR COUNTY OF HAWAII.

No. 1081.

APPEAL FROM CIRCUIT JUDGE, FOURTH CIRCUIT.

HON. C. K. QUINN, JUDGE.

ARGUED APRIL 24, 1918.

DECIDED MAY 7, 1918.

COKE, C. J., QUARLES AND KEMP, JJ.

*PATENTS—rights of purchaser from patentee.*

Where the manufacturer of an article protected by letters patent chooses himself to vend it, a purchaser can use the article in any part of the United States, and, unless restricted by contract with the patentee, can sell and dispose of the same.

*COUNTIES—purchasing property—tenders—competition.*

White automobile trucks contain parts protected by letters patent and are sold, in the first instance, only by the manufacturer and his authorized agents, but when sold the sale is without restriction as to resale. From these facts it follows that White automobile trucks admit of competition, and where the amount involved is one thousand dollars or more they cannot be purchased by a county without advertising for tenders as required by section 1418, R. L. 1915.

*STATUTES—construction—words and phrases.*

Construing a statute which provides that "No expenditure of public money except for \* \* \* or for other purposes which do not admit of competition, where the sum to be expended shall be one thousand dollars or more, shall be made, except under contract let after public advertisement for sealed tenders in the manner provided by law:" Held, not to except from the provision requiring tenders the purchase of motor trucks, which admit of competition.



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OPINION OF THE COURT BY KEMP, J.

On February 13, 1918, W. J. West filed in the circuit court of the fourth circuit his amended bill of complaint against the County of Hawaii, the Schuman Carriage Company, Limited, and Samuel M. Spencer, auditor of the County of Hawaii, the material allegations of which are as follows:

1. That the petitioner is a resident taxpayer of the Territory and County of Hawaii.

2. That the board of supervisors of the County of Hawaii on the 10th day of January, 1918, unlawfully and illegally appropriated or attempted to appropriate \$21,576.80 for the purchase of one touring automobile and three automobile trucks from the Schuman Carriage Company, Limited.

3. That the appropriation or attempted appropriation is illegal for the following reasons: (a) Because A. Akina, one of the members of the board of supervisors, was at the time of the appropriation, an employee of the Schuman Carriage Company. (b) Because no resolution or other legal proceeding had been passed or taken by the board of supervisors for the purchase of the automobiles in question. (c) Because no bids were called for as required by statute although said expenditure was for a purpose which admitted of competition.

The prayer was that said appropriation or attempted appropriation, and any resolution or proceeding or contract in relation thereto might be declared void and that the board of supervisors, the auditor of the County of Hawaii and the Schuman Carriage Company, Limited, might be permanently restrained from carrying out the said resolution and contract and that a temporary injunction might be issued pending the final determination of the proceeding and for other and general relief.

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The temporary injunction and order to show cause was issued as prayed for.

To the amended bill of complaint the respondents filed their joint and separate answer alleging in substance: That the petitioner is not a resident taxpayer of the County of Hawaii. That A. Akina was a member of the board of supervisors but was not an employee of the Schuman Carriage Company, Limited, as alleged by petitioner. That the supervisors of the County of Hawaii desired to purchase one touring car and three automobile trucks and thereupon examined the various kinds of touring cars and automobiles available, and after such examination came to the conclusion that the cars manufactured by the White Company, a corporation of the State of Ohio, are superior to all others and particularly adapted to the uses to which the County of Hawaii intended to put them, and thereupon determined to purchase one White touring car and three White trucks. That at the time of making said determination the said supervisors discovered that said car and trucks were manufactured only by the White Company and sold only by said company through its authorized agents, and that no other person could or would sell or attempt to sell the said cars and that said cars are articles which were not subject to competitive selling. That Schuman Carriage Company, Limited, was the sole agent of the White Company in the Territory of Hawaii. That no person in the Territory of Hawaii could purchase said cars except through said Schuman Carriage Company, Limited. That there was a listed price and no purchase could be made at any other price. That many of the parts of said cars were patented and the White Company owned and controlled the patents; and that because of the matters aforesaid the said cars were articles which did not admit of competition in the sale thereof and that to advertise for bids for such cars would be a useless and nugatory act.

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After a hearing on the facts the temporary injunction was, by decree duly entered, dissolved and the bill dismissed, from which decree the petitioner has appealed to this court.

The petitioner has practically abandoned two of the three contentions made by him at the trial, viz.: That one of the members of the board of supervisors was an employee of the Schuman Carriage Company, Limited, and that no resolution or other legal proceeding had been passed or taken by the board of supervisors for the purchase of the automobiles in question. The respondent offered no evidence to sustain his contention that the petitioner was not a resident taxpayer of the County of Hawaii, or to rebut petitioner's evidence that he was such taxpayer.

This leaves a single question for our consideration, to wit: Was the proposed expenditure, being for more than one thousand dollars, for a purpose which does not admit of competition? A portion of section 1418 R. L. 1915 is as follows: "No expenditure of public money except for \* \* \* or for other purposes which do not admit of competition, where the sum to be expended shall be one thousand dollars or more, shall be made, except under contract let after public advertisement for sealed tenders in the manner provided by law."

The petitioner and respondents are not in accord on the question of which one must assume the burden of proving whether or not the purpose for which the money was to be expended was a purpose which did not admit of competition.

In view of the fact that there is practically no conflict in the evidence upon the issue in question it is of very little importance in this case which side has the burden of proof as this court must merely determine the legal effect of the undisputed evidence before it.

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The real question upon which a correct decision in this case depends is the one above stated. If the proposed expenditure was for a purpose which admitted of competition the board of supervisors exceeded the authority conferred upon them by the statute quoted in undertaking the purchase without advertising for tenders. The board of supervisors have whatever power the statutes upon that subject have conferred upon them, and no other; and that power which they possess must be exercised in the mode prescribed by the statute, and in no other. The mode in such cases constitutes the measure of the power. With this principle as the measure of the power of the board of supervisors it follows that unless the proposed expenditure was for a purpose which did not admit of competition the board was without power to make it in the manner attempted. Indeed the principle is conceded, the contention of respondents being that the expenditure is for a purpose which does not admit of competition, and tenders therefore unnecessary.

The evidence having a bearing on this question comes almost entirely from respondents' witnesses and establishes the following facts: That from twenty-five to fifty out of about one thousand parts of a White motor truck are covered by letters patent owned or controlled by the White Company; that no one except the White Company manufactures said trucks; that Schuman Carriage Company, Limited, is the exclusive agent of the White Company in the Territory of Hawaii; that agents of the company are prohibited from selling White cars for more than the price fixed by the company but may sell for less; that when a car or truck is sold by the company or through its agents no attempt is made to restrict resales thereof; that the company's agents procure the cars and trucks from the company at less than the price fixed by the company as the maximum price at which they may be sold by

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the agent, the difference being the agent's profit; that agents often do, as was done in this case, sell for less than the maximum price; that White cars could have been bought by the county from other agents elsewhere but that the local agent would have received credit therefor.

Counsel for the respondents in his discussion of this phase of the case starts out with the proposition that as soon as an article appears to be sold under an exclusive agency such article is one which does not admit of competition and he relies on the case of *Lord v. City and County of Honolulu*, 20 Haw. 175, as authority for his contention. He says that the *Lord* case decides that it is unnecessary to call for bids for an article which has been patented and for which there is but one agent in the Territory. We do not so understand that decision. The petitioner in that case admitted that Gilman was the only person authorized to enter into a contract for constructing the patented pavement in Hawaii and contended that the selection of a patented pavement obtainable from only one source is against the policy of the statute which is intended to prevent graft or favoritism and that in order to accomplish this object the requirement of competitive bids implies prohibition of such selection.

This court decided that it was not against the policy of the statute to permit the board of supervisors to select a patented pavement obtainable from only one source and that the petitioner having admitted that Gilman was the only person authorized to contract for the particular pavement selected, to advertise for bids would not only be useless but absurd.

We think that the law as announced in that case is correct as applied to the facts there involved but we also think that the rule there announced should not be extended.

We are unable to see how the numerous paving cases cited by counsel have much bearing on the case at bar.

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The inherent difference between the two commodities involved prevents the same conclusion in the two classes of cases. The case of a paving contract, where the thing contracted for can only be had from the patentee or one who holds a license from him for a given territory, is quite different from a manufactured article which, like the paving, can, in the first instance, be purchased only from the patentee or his authorized agent but, unlike the pavement, immediately upon being sold by the patentee or licensee becomes a commercial commodity and subject to resale without restriction as to time or place.

The fact, which is in evidence, that White cars are sold by the White Company and its authorized agents with absolutely no restrictions considered in connection with the law as announced by the Supreme Court of the United States in the case of *Kcceler v. Standard Folding Bed Company*, 157 U. S. 659, establishes conclusively that White cars do "admit of competition." In the case just referred to the court said: "Where the patentee has not parted, by assignment, with any of his original rights, but chooses himself to make and vend a patented article of manufacture, it is obvious that a purchaser can use the article in any part of the United States, and, unless restrained by contract with the patentee, can sell and dispose of the same. It has passed outside of the monopoly, and is no longer under the peculiar protection granted to patented rights. As said by Mr. Justice Clifford, in *Goodyear v. Beverly Rubber Co.* (1 Cliff. 348, 354): 'Having manufactured the material and sold it for a satisfactory compensation, whether as material or in the form of a manufactured article, the patentee, so far as that quantity of the product of his invention is concerned, has enjoyed all the rights secured to him by his entire patent, and the manufactured article, and the material of which it is composed, go to the purchaser for a valuable consideration,

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discharged of all the rights of the patentee previously attached to it, or impressed upon it by the act of Congress under which the patent was granted.' "

In the case of *Adams v. Burke*, 17 Wall. 453, 456, Lockhart and Seelye owned by assignment, all the right, title and interest which the patentee had in a certain patented coffin lid in a circular district of a diameter of ten miles, whereof the city of Boston was the centre. Adams also by assignment was the owner of all other rights under the patent. Burke, an undertaker, carried on his business at Natick, and within the territory covered by the patent owned by Adams. To a bill of infringement, filed by Adams in the circuit court of the United States for the district of Massachusetts, Burke pleaded that the patent coffin lids used by him in the business were purchased by him from Lockhart and Seelye, and were sold to him without condition or restriction. The validity of his plea was sustained by the circuit court, and its decree dismissing the bill was affirmed by the Supreme Court of the United States.

A patented paving when once constructed cannot, like the folding bed in the *Keeler* case or the coffin lid in the *Adams* case, be removed from the place where laid and become an article of commerce, or in any manner compete with the holder of the patent right. Not so in the case of White cars.

From the showing that White cars contain parts protected by letters patent and are sold in the first instance only by the patentee and his authorized agents, where the sales are made without restrictions, as shown by the evidence in this case, it does not follow that they are not the subject of competition but this showing is conclusive of the fact that they do admit of competition.

The respondents also contend that as the petitioner testified that if he had been given an opportunity to bid he would

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not have submitted a bid on White trucks but would have bid on another make it would be absurd to grant him the relief prayed for.

But it must be borne in mind that the question is not whether the petitioner would have submitted a bid on White cars or any car at all. The petitioner is not required to show that he or any other person would have in fact submitted a bid. It is sufficient to take the case out of the exception in the statute if it is shown that the expenditure is for a purpose which "admits" of competition. This showing, we hold, has been made.

The decree is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

*W. H. Smith* (*J. W. Russell* with him on the brief) for petitioner.

*C. S. Carlsmith* (*W. H. Beers*, County Attorney of Hawaii, and *Carlsmith & Rolph* on the brief) for respondents.

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GILLSON D. BELL *v.* ENGELS COPPER MINING COMPANY, A CORPORATION, WILLIAM ENGELS AND HENRY ENGELS.

No. 1084.

MOTION TO DISMISS.

ARGUED MAY 7, 8, 1918.

DECIDED MAY 11, 1918.

COKE, C. J., QUARLES, J., AND CIRCUIT JUDGE ASHFORD IN PLACE OF KEMP, J., DISQUALIFIED.

APPEAL AND ERROR—*interlocutory exceptions*.

Where a party before final judgment seeks to have an interlocutory order in a term case reviewed in the supreme court he



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must reduce his exception to writing and present it to the trial judge for allowance and certification to the supreme court within ten days of the making of the interlocutory order sought to be reviewed under circumstances like those disclosed by the record in this case.

*Per Curiam:* In this cause an order was made orally by the court below on the 16th of February, 1918, dismissing the special plea of the defendant to the jurisdiction of the court which order was entered in the clerk's minutes and to which defendant then orally excepted. February 20 a written exception to said order was presented to the judge who allowed the same and such exception was filed on February 21, on which day a written order dismissing said plea to the jurisdiction of the court, bearing date February 16, was filed; on the same day the judge made and signed an order allowing the defendant an appeal from the interlocutory order dismissing the said plea to the jurisdiction of the court and on the same day the defendant filed in the court below notice of appeal from said order and bond on such appeal. Thereafter, doubtless coming to the conclusion that an appeal would not lie in this, a term case, and on March 8, the defendant left with the clerk of the trial court a bill of exceptions, the judge then being absent having left his office at about 4 p. m.; later the same day one of the attorneys for the defendant saw the judge at his residence, informed him that he had left a bill of exceptions with the clerk, asked him if it was all right, and understood the judge to say that it was; March 13 plaintiff filed objections to the proposed bill of exceptions of the defendant upon various grounds, the principal one being that the order excepted to is interlocutory and no exception thereto was reduced to writing, served and presented within the time required by law; March 18 the circuit judge made a certificate at the foot of the bill of exceptions which is as follows:

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"I hereby certify that I was not absent from Honolulu on March 8th, 1918, but was on the bench and at my chambers during office hours of said day; that after office hours of said day and at about 5 o'clock p. m. Mr. R. A. Vitousek called on me at my home and told me he had filed this bill of exceptions with Mr. Arthur E. Restarick, clerk of the circuit court, first circuit, assigned to the second division, and presented to me an order further extending time for the defendant to plead which he desired me to grant and which I did grant; that I made no objection to the presentation of the bill of exceptions to the clerk instead of to me in person, and I hereby certify and allow the foregoing bill of exceptions upon the ground that the same is advisable for a more speedy termination of the case."

March 21, the defendant filed a bond for all costs accrued and further costs to accrue in this court upon a hearing of the said bill of exceptions.

The plaintiff moves to dismiss the exceptions upon the ground that the order sought to be reviewed by the bill of exceptions is interlocutory; that the bill of exceptions was not certified as and for an interlocutory bill of exceptions within the time and in the manner provided by law.

The order sought to be reviewed is interlocutory. We regard the certificate of the circuit judge as sufficient to show that he allowed the bill of exceptions as an interlocutory exception so that the order excepted to might be reviewed in this court "for a more speedy termination of the case."

The motion to dismiss raises the important question of practice as to the time within which an exception to an interlocutory order must be certified to this court for review. Section 2513 R. L., prior to the amendment of 1898, related to exceptions generally, such as could be reviewed after judgment, provided two ways of preserving exceptions and contained a general provision as to incorporating in a bill of exceptions after verdict, or judgment when there is no

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verdict, all exceptions of record in the case. This statute contained, before amendment, the present provision that "A party may allege exceptions to \* \* \* any ruling or order, and the same being reduced to writing in a summary mode, and presented to the judge within ten days after the \* \* \* ruling or order objected to \* \* \* shall be allowed by the judge," or within such further time as the judge may in his discretion allow. This provision is for the purpose of preserving of record exceptions taken during the progress of the case. This proviso then follows: "That if any such exceptions are reported by a stenographer or entered in the judge's minutes they need not be written out or presented to or allowed or signed by the judge within such time, but may be written out at the request of the party taking such exceptions and allowed and signed by the judge and filed with the clerk at any time." We find the provision as to bills of exceptions in the following language contained in the proviso: "And any such exceptions, whether so reduced to writing in a summary mode and allowed and signed by the judge, or so written out, whether allowed or signed by the judge or not, or filed with the clerk or not, may at any time within twenty days after verdict or when there is no verdict, after judgment rendered \* \* \* or such further time as may be allowed by the judge, be incorporated in a bill of exceptions and presented to the judge." This statute contemplates that exceptions to interlocutory rulings or orders shall be preserved either in the one way or the other and that only one bill of exceptions shall be presented, and it after verdict if there is one, or judgment if there is no verdict. The time fixed by the statute for reducing to writing an exception to an interlocutory ruling or order which is not reported by a court stenographer or entered in the judge's minutes is ten days or such further time as the judge in his discretion may allow. The time fixed for presenting a bill of excep-

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tions into which are incorporated the exceptions taken during the progress of the case up to the verdict, or judgment if there is no verdict, is twenty days or such further time as the judge in his discretion may allow. Under this statute the correct practice when a party seeks to have an interlocutory ruling or order reviewed in this court prior to judgment is to reduce to writing in a summary mode his exceptions, making a part thereof by reference or setting out the same in *haec verba* those parts necessary to a determination of the questions raised by his exceptions and have them certified by the judge to this court for review so as to expedite the final termination of the case. Query: In what time must this be done?

Before the amendment of this statute in 1898 an interlocutory ruling or order was not subject to review in this court prior to final judgment. That amendment, so far as important here, is as follows: "Bills of exceptions upon like terms as to filing bond and payment of costs, may be certified to the supreme court from decisions overruling demurrers or from other interlocutory orders, decisions or judgments, whenever the judge in his discretion may think the same advisable for a more speedy termination of the case." In the case at bar there was no extension of time in which to reduce to writing the exception to the interlocutory order sought to be reviewed shown by the record, and that exception is not such as would usually or probably be entered in the judge's minutes or reported by the court stenographer in his minutes. We interpret the statute to mean that the exception to an interlocutory order sought to be reviewed should be reduced to writing and presented to the judge for allowance within ten days, which was not done in the case at bar. The exception which was reduced to writing and allowed and signed by the judge and filed February 21, did not set out the plaintiff's complaint, summons, plea of defendant to the jurisdiction of the court, or

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the order dismissing the plea, nor did it by reference make them parts of the exception; but we are not called on to decide upon the sufficiency of that exception owing to the fact that it was not certified to this court for review. If it had been sufficient, which we do not decide, it was within time and could have been certified by the judge to this court for review of the order excepted to so as to expedite the termination of the case. Act 40 S. L. 1898, which contains the foregoing amendment, also contains a similar amendment to a preceding section of the same chapter granting appeals whereby an appeal from an interlocutory order may be allowed by the trial judge for a more speedy termination of the case. These two amendments are in the same act and were both doubtless enacted for the same end and purpose, to wit, to expedite the termination of cases by authorizing the review of interlocutory rulings and orders prior to judgment. In *Middleditch v. Cathcart*, 19 Haw. 299, it was suggested that these two amendments should be treated alike and it was there held (in a chambers case) that the interlocutory appeal must be allowed within five days from the making of the ruling or order sought to be reviewed and not within five days from the allowance of such appeal by the trial judge. If the interlocutory appeal must be taken within five days by parity of reason it should be held that an interlocutory exception must be presented to the trial judge within ten days under circumstances such as are disclosed by the record in this case, and we so hold.

The exception which was certified was not presented to the judge within the time required by the statute and the motion to dismiss must be sustained.

This conclusion makes it unnecessary to determine what is meant by the words "upon like terms as to filing bond and payment of costs" found in the amendment to the statute and whether the costs must be paid and bond given

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within a certain given time, and that question, which we realize is of considerable importance to the bench and bar of the Territory, is left open for determination when it becomes necessary so to do. It is also unnecessary to decide whether leaving the bill of exceptions with the clerk and calling the attention of the judge to that fact under the circumstances disclosed in the record before us was a sufficient presentation to the judge, and we do not pass on that question.

The motion to dismiss will be sustained and it is so ordered.

*E. C. Peters* for the motion.

*J. W. Cathcart* and *R. A. Vitousek* contra.

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ALFRED SILVA *v.* KAIWIKI MILLING COMPANY,  
LIMITED, AND HOME INSURANCE COMPANY  
OF HAWAII, LIMITED.

No. 1077.

EXCEPTIONS FROM CIRCUIT COURT, FOURTH CIRCUIT.

HON. C. K. QUINN, JUDGE.

ARGUED APRIL 25, 1918.

DECIDED MAY 14, 1918.

COKE, C. J., QUARLES AND KEMP, JJ.

WORKMEN'S COMPENSATION ACT—*construction.*

The words "out of" and "in the course of," as used in the Workmen's Compensation Act, providing that if a workman receives personal injuries by accident arising out of and in the course of his employment he shall be compensated, are not synonymous terms. An injury may be received in the course of the em-

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ployment and still have no causal connection with it so that it can be said to arise out of the employment.

SAME—*same*.

S, the manager of a sugar mill, was accidentally injured while participating in a celebration which took place at the final completion of the construction of the mill it being his duty to assist in conducting the celebration. Held that the injury sustained by S arose both out of and in the course of his employment.

SAME—*same*

Compensation acts being highly remedial in character, though in derogation of the common law, should generally be liberally and broadly construed to effectuate their beneficent purposes.

OPINION OF THE COURT BY COKE, C. J.

The complainant, appellee, Alfred Silva, on July 16, 1916, was, and for some time prior thereto had been employed as, the manager of the Kaiwiki Milling Company, Limited, a domestic corporation. This company had erected a mill at or near Hilo, Hawaii, for the purpose of manufacturing sugar from cane to be grown by the homesteaders and independent land-holders in the vicinity of the mill. The mill had just been completed, and on the date mentioned, which fell on a Sunday, the mill machinery was to be started up for the first time and it was decided by the manager, after consultation with several of the directors of the company, who approved of the plan, that this occasion, which was of great interest to the company as well as to the community, should be duly celebrated. The complainant had charge of the celebration and it was participated in by some of the directors, stockholders, employees of varied nationality, and others. Mr. Cabrinha, one of the directors, had a prominent part in the celebration, and a portion of the expenses of the ceremonies was borne by the company. Some of the Japanese employees, after securing permission from the manager, had constructed a scaffolding about fifty feet in

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height over a portion of the mill from which rice cakes containing small pieces of money were to be thrown among the spectators on the ground below. This was in keeping with a Japanese custom which it was supposed portended good luck to the company and the new enterprise about to be launched. On the day mentioned the mill machinery was started in operation, a bottle of champagne was broken over the rollers, speeches were made and a general feast was indulged in. The complainant was importuned by some of the Japanese employees to accompany them upon the scaffolding and to take part in the throwing of the rice cakes. Acceding to the request he ascended the scaffolding which collapsed, and the complainant, together with others, was precipitated to the ground below. The complainant's back was broken, causing total disability. The complainant presented notice of his injury and claim for compensation under the Workmen's Compensation Act to the industrial accident board of the County of Hawaii against the Kaiwiki Milling Company, stating in the notice the nature and cause of the injuries. An arbitration committee constituted in accordance with the provisions of the act found in favor of the complainant. Thereupon the mill company took the matter for review to the industrial accident board, which also found in favor of the complainant. The record below shows that at this stage of the proceedings the respondent, the Home Insurance Company of Hawaii, Limited, made itself a party to the proceedings, designating itself as the "insurance carrier," and it, together with the Kaiwiki Milling Company, gave notice of appeal from the findings and award of the industrial accident board to the circuit court of the fourth judicial circuit. A hearing was thereafter had before said circuit court without a jury. Both of the respondents appeared and vigorously contested the claim of the complainant. The decision and judgment of the circuit court



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was for the complainant and the respondents now come before this court on exceptions.

Numerous exceptions are specified in respondents' bill of exceptions, only three of which now appear to be relied upon, to wit: (1) The injury for which the judgment was given did not arise out of and in the course of the employment of the complainant. (2) No evidence was offered showing the liability of the Home Insurance Company of Hawaii, Limited. (3) The complainant at the time of his injury was receiving from the employer an amount greater than \$36 per week and so was not an employee within the terms of the Workmen's Compensation Act.

Little need be said in this opinion respecting the last two exceptions specified. The first exception, however, calls for a construction of section 1 of Act 221, S. L. 1915, and known as the Workmen's Compensation Act. The section reads as follows:

"Section 1. This Act shall apply to any and all industrial employment, as hereinafter defined. If a workman receives personal injury by accident arising out of and in the course of his employment, his employer or the insurance carrier shall pay compensation in the amounts and to the person or persons hereinafter specified."

It is vigorously contended by counsel for the respondents that the injuries sustained by complainant did not arise out of and in the course of his employment. Counsel's main contention seems to be that while the accident may have arisen in the course of complainant's employment it did not arise out of such employment. The attempts of courts to formulate general rules relative to the distinction between the terms "out of" and "in the course of" have met with little success. All agree, however, that the terms are not intended to be synonymous. An injury may be received in the course of the employment and still have no causal connection with it so that it can be said to arise

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out of the employment. But it is difficult to conceive of an injury arising "out of" and not "in the course of" the employment. The importance of distinguishing between these terms arises from the fact that each represents an element essential to, but not authorizing, the recovery of compensation without the presence of the element represented by the other. In other words, even though the injury occurred "in the course of" the employment, if it did not arise "out of" the employment there can be no recovery, and even though it arose "out of" the employment, if it did not occur "in the course of" the employment there can be no recovery. The words "out of" point to the origin and cause of the accident or injury, the words "in the course of" to the time and place and circumstances under which the accident or injury takes place.

The words "out of" involve the idea that the accident is in some manner due to the employment. It is conceded by complainant that there must be a causal connection between the conditions under which the employee worked and the resulting injury. While the appearance need not have been foreseen or anticipated it must appear after the event to have its origin in a risk connected with the employment and to have flowed from that source as a rational consequence. The statutory requirement should not be narrowly construed, however. An employee must reasonably be allowed some latitude for the exercise of his own judgment as to when and how he can best serve the interests of his employer.

It is a matter of common knowledge throughout this Territory that the managers of sugar mills and of sugar plantations have no specific hours or days of labor; their duties are continuous as regards time. The manager of a sugar mill may be called upon for the performance of some duty at any hour of any day or night. This condition obtaining it is plain to be seen that the complain-

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ant was in the course of his employment, that is to say, was within the time thereof, when the accident occurred which resulted in his injury. And while the manager's duties are continuous as regards the course of time of his employment it is likewise true that his duties cover a wide range and are multifarious in character. He is required to perform many services which are only remotely connected with the actual manufacture of sugar—the primary object of the plant.

The undisputed evidence in this case is that the celebration that was being conducted on the day in question was for the benefit of the mill company "to show that the mill was completed and to aid in selling the company's stock." This celebration was not only sanctioned, but participated in, by a number of the directors of the company and part of the expenses of the celebration was defrayed out of the funds of the company. It being the duty of the manager to assist in the celebration it follows as a matter of law that the injury he sustained arose "out of" his employment.

Counsel for the respondents insistently urges that the throwing of the rice cakes, for which the scaffolding was erected, was distinctively a Japanese affair separate and apart from the celebration with which the manager was concerned. The evidence does not sustain this contention. Various forms of amusement were indulged in, all a part of one general event. The Japanese laborers participated, and, as expressed in the evidence, it was a Japanese as well as a Portuguese celebration, and all for the benefit of the company.

Workmen's compensation laws are of recent origin but have met with spontaneous approval throughout the country. The Federal Government, a large majority of the States, Alaska, the Canal Zone and this Territory now have measures for the relief of injured workmen, all bear-

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ing a close resemblance. The administration of these laws necessitates an appreciation of the legislative purpose to abolish the common law system relating to injuries to employees as inadequate to meet modern conditions and substitute therefor a system based on a high conception of man's obligation to his fellow-man, a system recognizing every personal loss to an employee, which is not self-inflicted, as an element of the cost of production to be charged to the industry rather than to the individual employer, and liquidated in the steps ending with consumption so that the burden is finally borne by the community in general. The authority for this legislation is that power of the State termed the police power; a power by which the legislature supervises matters relating to the common weal and enforces the observance by each member of the State of duties owed by him to others and to the community at large. All rights are possessed and enjoyed subject to it. Under it the State may prescribe regulations for the promotion of health, peace, morals, education and good order and so legislate as to increase the industries of the State. Reduced to its last analysis the police power is a power of government. It is inherent in every sovereignty. Compensation acts being highly remedial in character, though in derogation of the common law, should generally be liberally and broadly construed to effectuate their beneficent purposes. *In re Ichijiro Ikoma*, 23 Haw. 291, 295; *Kennerson v. Thames Towboat Co.*, 94 Atl. 372; *Coakley's Case*, 216 Mass. 71; *The State ex rel. Northfield v. District Court*, 131 Minn. 352. Numerous decisions of recent date have been handed down, many of which bear upon the question now under consideration.

Where a servant undertakes in the course of his employment, during the proper hours therefor and in the proper place, to do something in the furtherance of his master's business and meets with accidental injury therein the trial

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court's findings that the accident arose out of and in the course of the employment should not be disturbed unless it is clear that the ordinary servant, in the same situation, would have no reasonable justification for believing that what he undertook to do when injured was within the scope of his implied duties. *State ex rel. Duluth Brewing & Malting Co. v. District Court*, 151 N. W. 912, 914. See also *Elk Grove Union High School District v. Industrial Accident Commission*, 168 Pac. 392. An accident arises "in the course of the employment if it occurs while the employee is doing what a man so employed may reasonably do in the time during which he is reasonably employed and at a place where he may reasonably be during that time and it arises 'out of' the employment when it is something the risk of which may have been contemplated by a reasonable person, when entering the employment, as incidental thereto." *Bryant v. Fissell*, 86 Atl. 458; *Martucci v. Hills Bros. Co.*, 156 N. Y. S. 833, 834.

We are of the opinion that the injury received by the complainant and for which judgment was given arose both out of and in the course of his employment.

The contention made by the respondents to the effect that at the time of the injury complainant was receiving from the employer an amount greater than \$36 per week and that he was for this reason precluded from recovery herein is entirely groundless. The evidence clearly shows that at the time of the injury the defendant herein was receiving the sum of \$75 per month and no more, and this status we hold was not changed by reason of the fact that in February 1917 the directors of the company voted to issue to complainant one hundred shares of the capital stock of the company in recognition of his services, money and credit in promoting the company.

The other remaining exception appearing in the record is that "No evidence was offered showing the liability of

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the Home Insurance Company of Hawaii." In the notice of injury and claim for compensation filed with the industrial accident board by complainant the insurance company was not made a party thereto but the insurance company thereafter voluntarily appeared and made itself a party to the proceedings and filed a notice of appeal from the findings and award of the industrial accident board, designating itself in the notice as the "insurance carrier" and thereafter continued to appear and defend through the various proceedings including the proceedings before this court. The definition of "insurance carrier" contained in the Workmen's Compensation Act is as follows: " 'Insurance carrier' shall include stock corporations or mutual associations from any of which employers have obtained workmen's compensation insurance or guaranty insurance in accordance with the provisions of this act." S. L. 1915, p. 348. The voluntary appearance of the insurance company, its designation of itself as the "insurance carrier" and the absence of any denial by it at any time of liability branded it as a corporation or association from which the employer had obtained workmen's compensation insurance or guaranty insurance in accordance with the provisions of the act and the complainant was not required to offer proof of that fact, the status of the insurance company being fixed by the section of the act above quoted. In the early stages of the proceedings the insurance company voluntarily made itself a party thereto actively and continuously contesting complainant's claim and its belated attempt to now escape responsibility can find no tolerance here.

The exceptions are overruled.

*W. H. Smith* for complainant.

*C. S. Carlsmith* (*Carlsmith & Rolph* on the brief) for respondents.

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IN RE TAXES WAIAKEA MILL COMPANY.

No. 1065.

APPEAL FROM TAX APPEAL COURT, FOURTH CIRCUIT.

ARGUED APRIL 30, MAY 1, 1918.

DECIDED MAY 15, 1918.

COKE, C. J., QUARLES AND KEMP, JJ.

**TAXATION—valuation—enterprise for profit.**

The value of property combined in an enterprise for profit is not less than the aggregate value of the separate items making up the whole unless the value of the items has been depreciated by reason of their combination.

**SAME—same—mature crop of cane.**

The value of a mature crop of cane for taxation purposes is the amount the sugar it will produce would bring when harvested considering the price of sugar on January 1 of that year less the cost of harvesting, marketing, etc., and of necessity this value can only be approximated.

**SAME—judgment of tax appeal court—consideration to be given such judgments.**

The valuation fixed by the tax appeal court should not be disturbed unless good reason appears therefor.

OPINION OF THE COURT BY KEMP, J.

This is an appeal by the Waiakea Mill Company from the decision and judgment of the tax appeal court for the fourth judicial circuit sustaining the assessment of the company's property at a valuation as of January 1, 1917, in the sum of \$1,250,000.

The company returned its property for taxation as an enterprise for profit at the sum of \$800,000; it was assessed at \$1,250,000, and on appeal to the tax appeal court the assessment was sustained.

At the hearing before the tax appeal court it was agreed

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that the values placed by the taxpayer on the various items of its tangible assets were correct, except the valuations placed by it upon (a) its 1917 growing cane, (b) its 1918 growing cane and (c) its fee simple holding of forty acres constituting its mill site.

The values upon which the assessor and the taxpayer have agreed aggregate the sum of \$350,060. In arriving at the total value of the tangible property owned by the taxpayer it is therefore only necessary to ascertain the value of the two crops of cane and the mill site, which, added to the agreed values, will be the total value of the taxpayer's tangible property.

The 1917 crop of cane was returned by the taxpayer at \$234,496.14 but is now admitted to have been worth \$429,230. The assessor placed a value of \$937,500, on this crop. The tax appeal court arrived at a value of \$595,320.

The 1918 crop of cane was returned by the taxpayer at \$159,083. The assessor placed its value at \$457,500, while the tax appeal court found its value to be one-half the value of the 1917 crop, or \$297,660.

The taxpayer returned its mill site consisting of forty acres owned in fee simple at \$10,000. The assessor placed its value at \$40,000 and the assessment was sustained by the tax appeal court.

The total value of the tangible assets of the taxpayer, as shown by the figures above detailed, partly agreed upon and partly found by the tax appeal court to be the correct valuation of the separate items making up the whole, is the sum of \$1,283,040.

In response to a request of counsel for the taxpayer the tax appeal court has sent up as part of the record on appeal an analysis of the methods used by it in arriving at a valuation of the enterprise involved in this case. Counsel has criticized these methods, but we are not so much concerned with methods as we are with results. If the value



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arrived at by the use of the alleged erroneous methods is sustained by the evidence the court's finding should not be disturbed.

If then the tax appeal court was justified by the evidence in its conclusions as to the value of the items in dispute the value fixed by the assessor on the property as a going concern or an enterprise for profit and sustained by the tax appeal court is \$33,040 less than the total value of the separate items making up the whole. The value of the whole would not be less than the sum of its parts unless the value of the parts was depreciated by reason of their combination (*In re Taxes Union Mill Co.*, 23 Haw. 46 at 50).

It then becomes necessary for us to examine the evidence for the purpose of determining two questions, viz., (a) Are the three disputed items of tangible assets of the value found by the tax appeal court; and (b) As an enterprise for profit is the value of the whole depreciated by reason of the combination of the parts and if so to what extent?

Mr. Williams, the secretary of Waiakea Mill Company, the taxpayer, has testified that the price his company paid for cane grown by others and sold to it in 1916 was \$4.25 per ton at the mill and that it cost sixty-one cents per ton to harvest and deliver it, thus the price net to the grower was \$3.64 per ton of cane. The company's estimate for the 1917 crop was 121,000 tons of cane. He further testified that his company purchases about 90% of the cane milled by it and that a sliding scale of prices is maintained by it based on the price of sugar prevailing on the date of the purchase. If this mill owner allows the price of sugar to determine the price it will pay for cane from other growers why should not the assessor and the courts consider the price of sugar in arriving at the valuation for taxation purposes to be placed on a mature crop of cane standing in the field?

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The fact that the mill owner (in this case also the taxpayer) would pay only \$4.25 per ton for cane delivered at its mill by other growers, especially when it is not shown what the conditions of the contracts with the growers are, should not be taken as establishing the market value of cane.

It is to be inferred from the return of the taxpayer in this case that at least a portion of the cane purchased by it is grown by its sub-lessees on the lands leased by it from the government (there being a list of some thirty sub-lessees attached to the return) and the terms on which this cane is grown and sold to the company have not been shown further than is shown by the testimony of Mr. Williams to which we have referred.

We think the value of a mature crop of cane ready for the harvest is the amount the sugar it will produce would bring when harvested, considering the price of sugar on January 1 of that year, less the cost of harvesting and marketing, etc. Of course neither the taxpayer nor the assessor can know absolutely what the cane is worth to the taxpayer while it is still standing in the field and of necessity must be approximated.

From the evidence in this case given by the tax assessor it appears that the cost of harvesting, milling, insurance, freight, weighing, commissions and incidental expenses of marketing in 1916 amounted to \$21.90 per ton of sugar. To this amount the assessor added 25% to cover increased cost, making the cost per ton of sugar (not including of course the cost of bringing the crop to maturity) amount to \$27.375. After the assessor had testified in detail as to these costs Mr. Williams was called in rebuttal and disputed one item of expense which entered into the assessor's calculation. He did not question the other items. The assessor allowed approximately \$8 per ton of sugar for freight, weighing, insurance and incidentals, while Mr.

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Williams estimated those items at \$13. The assessor then testified that on January 1, 1917, sugar was worth \$105.40 per ton, while Mr. Williams placed it at \$101.60; that he deducted \$27.375 from the value of a ton of sugar leaving a net of \$78. He then allowed a further deduction from this amount of \$18 to cover all contingencies leaving a net return of \$60 to the plantation for every ton of sugar its cane would produce. 14,000 tons of sugar is the least estimate placed on the 1917 crop by any of the witnesses. The assessor testified that the plantation manager's estimate was 15,000 tons. From these calculations by the assessor it is clear that the crop standing in the field, using the least estimate of tonnage, was worth to the company \$840,000, whereas the tax appeal court has placed a valuation of only \$595,320 upon it.

As to the 1918 crop of cane the taxpayer contends that the amount spent upon it is the only fair valuation to be placed thereon while the assessor and the tax appeal court have regarded it as of one-half the value of the mature crop. From the evidence it is clear that this crop had no market value at the time of the assessment. It could not be then harvested and converted into sugar as it contained none. The taxpayer contends that if the theory of the assessor is correct the crop was only one-third and not one-half matured. But the evidence clearly shows that it was one-half as far advanced as the 1917 crop, the evidence being that the planting of the 1917 crop began in the early part of 1915 and extended over a period of several months of that year, while the planting of the 1918 crop began a year later and extended over a like period. The evidence shows that more than half as much had been expended on the 1918 crop as had been expended on the 1917 crop, Mr. Williams having testified that there had been expended on the 1917 crop the sum of \$234,496.14, while on the 1918 crop there had been expended the sum

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of \$159,083. The taxpayer contends that as the younger crop contains no sugar and is liable to many risks, such as drought, excessive rainfall, insects, bugs and leaf-hoppers, that therefore the amount expended on it is the only thing proper to be considered in estimating its value. As said by the court in the case of *Tax Assessment Ewa Plantation Co.*, 16 Haw. 555, 559: "It is impossible to lay down definite rules for valuing a sugar plantation. Possibilities of disasters and losses, low prices and increased cost of production enter into the estimate of values of such properties, and when those things occur the values are reduced accordingly." See also *Re Taxes Hauri M. & P. Co.*, 23 Haw. 46, where the court said: "The further argument of counsel for the appellant refers to the fact that since the last appeal was decided legislation has reduced the duty on raw sugar and provided for its abolition on May 1, 1916. This is a matter which affects the sugar properties throughout the Territory, but just what result the admission of sugar duty free will have upon the taxable value of sugar plantations can better be determined after the happening of the event."

While the court in each of the cases quoted was discussing the valuation of a plantation as an enterprise for profit, we think what it said applies in the valuation of a crop of growing cane and that too much prominence should not be given to forebodings of disasters which may befall the growing crop but rather await the happening of the event when it can be taken into consideration in fixing future values.

We are not prepared to say that it was improper to consider the relative age of the two crops in estimating the value of the 1918 crop, or that the value thus ascertained is not correct.

The evidence as to the value of the forty acres of land constituting the mill site is conflicting. Two witnesses

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have sworn that it is, in their opinion, worth \$40,000, the value placed upon it by the assessor and the tax appeal court, while two other witnesses have sworn that, in their opinion, it is worth not more than \$10,000. The tax appeal court was justified by the evidence in finding as it did that it was worth \$40,000 and its finding should not be disturbed.

Viewing then the property combined as an enterprise for profit what does the evidence show? The average profits per annum for the period of six years (1911 to 1916 inclusive), as shown by the evidence, have been, in round numbers, \$436,000. The average profits per annum for the period of four years (1913 to 1916 inclusive) have been, in round numbers, \$450,000. While the income which a property will produce is not the only thing to be considered in estimating its value as an enterprise for profit as said by the court in *Tax Assessment Appeals*, 11 Haw. 235 at 238, this "is one of the most potent factors in determining its value." If we should capitalize these profits at 10% we would get a valuation of from \$4,360,000 to \$4,500,000. Or taking the very liberal figure of 15% as the basis of capitalization we would arrive at a valuation of from \$2,900,000 to \$3,000,000. A capitalization of \$436,000 profits at approximately 35% would show a value equal to that fixed by the assessor and the tax appeal court. But Mr. Williams has submitted an estimate which it is insisted shows that, as an enterprise for profit, \$800,000 is a fair valuation of the property under consideration. However, comparing his estimate with other figures submitted by him we are forced to the conclusion that his estimate is not reliable. He says that a purchaser of the properties at \$800,000 would be compelled to make an additional outlay of \$2,000,000, making a total investment of \$2,800,000. He then says that he would expect to harvest 30,000 tons of sugar from the two remaining crops

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which were to mature before the expiration of the lease, for which he would expect a gross return of \$3,000,000, thus leaving only \$200,000 to cover contingent expenses. He has not told us why it would be necessary to make an additional expenditure of \$2,000,000, but from other figures submitted by him and the assessor it is easily demonstrated that no such expenditure would in fact be necessary. It must be borne in mind that the 1917 crop, already mature on the land, had only to be harvested, milled and marketed. The outside figure necessary for these items, as shown by the evidence, is \$30 per ton. 15,000 tons at \$30 would be \$450,000. The 1918 crop was already well advanced and assuming that it would be brought to maturity for the same outlay of capital as the 1917 crop only \$75,000 additional capital would be necessary for that purpose. Then allow them the same amount for harvesting, milling and marketing the 1918 crop and we would have, including the purchase price of \$800,000, a total outlay of \$1,775,000, for which Mr. Williams would expect a gross return of \$3,000,000, without taking account of the tangible assets which are admitted to be worth \$360,000, and counting nothing for such crop as may be taken from the land in 1919 up to June 1 of that year when the lessee must be off the land. It is apparent from the figures submitted by the witnesses that the item of \$2,000,000 expense necessary to realize the benefit of the crops on the land has been greatly exaggerated, and that notwithstanding the fact that the lease held by the taxpayer from the government is soon to expire, the estimate of \$800,000 is far too low. In fact we cannot conceive of a more liberal treatment of an enterprise than has been accorded the one involved in this case.

The assessor was extremely liberal in his reductions as was the tax appeal court on account of the short term of the lease.

**Syllabus.**

The evidence as a whole tends to support the finding of the tax appeal court. The decision of that court should not be disturbed unless good reason appears for doing so (*In re Taxes Haw. Sugar Co.*, 16 Haw. 236, 238).

Judgment affirmed.

*W. L. Stanley* for the taxpayer.

*A. G. Smith*, Attorney General (*C. S. Franklin*, Deputy Attorney General, on the brief), for the assessor.

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**MOSES NAOPALA AND MANUEL FRANK v. JOHN P. HINA.**

No. 1092.

**SUBMISSION UPON AGREED STATEMENT OF FACTS.**

ARGUED MAY 13, 1918.

DECIDED MAY 15, 1918.

**COKE, C. J., QUARLES AND KEMP, JJ.**

**DEEDS—*naming grantee.***

Where the granting clause of a deed fails to name the grantee or it is doubtful therefrom in whom the estate is intended to vest the omission may be cured or the uncertainty cleared away by the habendum wherein the grantee is named.

**JOINT TENANCY—*tenancy in common—statutes.***

If there is a doubt as to whether the grantor intended by his deed to vest an estate in joint tenancy or in tenancy in common the deed must, under the provisions of section 3132 R. L., be construed to create an estate in common and not one in joint tenancy or by entirety. If, however, it manifestly appears from the tenor of the deed that it was intended to create an estate in joint tenancy the deed must be given that effect.

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## OPINION OF THE JUSTICES BY QUARLES, J.

November 23, 1905, Kamaki Hina executed in the Hawaiian language a deed the translation into English of which is as follows:

"Know all men by these presents, I, Kamaki Hina, of Niolopa, Honolulu, Island and County of Oahu, Territory of Hawaii, for Fifty good Dollars (\$50.00) duly received in my hand from John P. Hina, Mrs. Kealoha Ka-ne, and Mrs. Kaulualii Manuel, my own children, and this instrument is the proof for the due receipt of said money, and also for their duly consenting to carry out this idea of mine as follows:

"The lot of land conveyed by this instrument to descend to them and the last survivor of them living, this lot of land to belong to him and his heirs, representatives and assigns forever, no claims to be made by the heirs of those who may die first, but they may sell, mortgage or lease, if they unanimously agree for such purpose.

"Therefore, I do make, grant, sell and convey that piece of land situated at Maunakea Street, Honolulu aforesaid, being the land described in Royal Patent 4396, Land Commission Award No. 187, awarded to Kalama, and being the same land conveyed to me (Kamaki Hina) by a certain deed recorded in Book 254, Page 372 of the Registry Office of the Government.

"To have and to hold the land designated above and all things thereon, the rights and benefits of every nature unto John P. Hina, Mrs. Kealoha Ka-ne and Mrs. Kaulualii Manuel aforesaid, and their heirs, representatives and assigns as designated above forever."

During the lifetime of the grantor his daughters Kealoha Ka-ne and Kaulualii Manuel died leaving no children surviving them but both leaving husbands, each of whom appears here as a plaintiff. Later the grantor died leaving surviving him his only son and heir, the defendant John P. Hina, the remaining grantee in said deed. Each of the plaintiffs claims to have inherited one-half of his wife's interest in the land conveyed by said deed and that



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the other one-half thereof was inherited by the grantor, and both plaintiffs contending that at the death of the grantor the interests which he inherited from his two daughters descended to his son, the defendant. It is thus seen that each of the plaintiffs claims an undivided one-sixth interest in the land conveyed by said deed and each admits that the defendant owns an undivided two-thirds interest therein. On the other hand the defendant claims that the said deed created an estate in entirety in the grantees and made them joint tenants, with right of survivorship in the sole surviving grantee, and consequently that as surviving grantee under said deed he owns the whole of the lands conveyed by the deed. To settle these contentions the parties have submitted the controversy without action to this court upon an agreed statement of facts in which the above facts are shown.

The only question before us for determination is as to the estate conveyed by the said deed, whether it is an estate in entirety or an estate in common; whether it made the grantees joint tenants or tenants in common. If it created a joint tenancy the defendant has succeeded to the entire estate in the lands conveyed; if, on the other hand, it created a tenancy in common the contentions of the plaintiffs must be sustained. The deed was evidently drawn by a layman and is unique in phraseology. The granting clause does not specifically name a grantee or grantees. There is no repugnancy between the premises and the habendum and we find in the habendum the names of the grantees, namely, the defendant and the deceased wives of the plaintiffs. Expressions in the premises of the deed show clearly that the grantor intended that the grantees therein named should take in entirety—as joint tenants—and the language found therein “The lot of land conveyed by this instrument to descend to them and the last survivor of them living, this lot of land to belong to

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him and his heirs, representatives and assigns forever, no claims to be made by the heirs of those who may die first" is susceptible of no other meaning. The language found in the habendum "To have and to hold the land designated above and all things thereon, the rights and benefits of every nature unto John P. Hina, Mrs. Kealoha Ka-ne and Mrs. Kaulualii Manuel aforesaid, and their heirs, representatives and assigns as designated above forever" shows that the grantees are the same parties, his said three children, who by the premises are to take as joint tenants and who are to take "as designated above." Where the premises fail to name the grantee or grantees or it is doubtful therefrom in whom the estate is to vest the omission or uncertainty may be cleared away by the habendum (Devlin on Deeds, 2 ed., Sec. 219) wherein the grantee or grantees are specified, and in such event there is no repugnancy between the premises and the habendum. The phrase "as designated above," used in the habendum, signifies: "As pointed out above; as made known above; as in the manner shown above; as described above." The granting clause and the habendum harmonize, and read together signify the clear intent of the grantor that the grantees, his three children therein named, should take under the deed an estate in entirety which should go to the survivor and his heirs, and clinched this intention by expressly declaring that no claims should be made by the heirs of those who should die first. Section 3132 R. L., adopted prior to the deed in question, provides: "All grants, conveyances and devises of land, or of any interest therein, hereafter made to two or more persons, shall be construed to create estates in common and not in joint-tenancy or by entirety, unless it shall manifestly appear from the tenor of the instrument that it was intended to create an estate in joint-tenancy or by entirety." Under this statute, in case of a doubt as to the intention of the grantor as to

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whether the estate granted should be in entirety or in common, the doubt should be resolved in favor of an estate in common and the grantees would take as tenants in common. The statute does not prohibit joint tenancies but simply requires that the intent must manifestly appear to create a joint tenancy, otherwise it must be held to be a tenancy in common. We think it manifestly appears from the tenor of the deed in question that it was intended to create an estate in joint tenancy, and we so hold.

A judgment may be prepared adjudging that the defendant owns the land described in the deed and in the statement of facts and that the plaintiffs own no interest therein, and it is so ordered.

*W. C. Achi* (*W. C. Achi, Jr.*, with him on the brief) for plaintiffs.

*P. L. Weaver* for defendant.

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IN RE TAXES UNION MILL COMPANY.

No. 1069.

APPEAL FROM TAX APPEAL COURT, THIRD CIRCUIT.

ARGUED MAY 1, 2, 1918.

DECIDED MAY 17, 1918.

COKE, C. J., QUARLES AND KEMP, JJ.

APPEAL AND ERROR.

Where a taxpayer appeals from the decision of the tax appeal court fixing the value of his property at more than his return but at less than the assessment, and the assessor does not appeal, held: That under these circumstances the valuation fixed by the tax appeal court constitutes the maximum valuation which this court could place upon the property.

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TAXATION—*weight of decision of tax appeal court.*

The decision of a tax appeal court in fixing values is presumed to be correct and should not be lightly overturned.

## OPINION OF THE COURT BY KEMP, J.

The Union Mill Company returned its property for taxation as an enterprise for profit as of January 1, 1917, at \$200,000. The tax assessor assessed it at \$450,000, from which assessment the company appealed to the tax appeal court of its district and that court fixed the value at \$402,835.86, from which the company has appealed to this court.

The attorney general representing the assessor has advanced the argument that, notwithstanding the fact that the assessor has not appealed from the decision of the tax appeal court, we can, if we find the value fixed by the tax appeal court too low, place the value back at the amount at which the assessor placed it; that the hearing before this court is in effect a trial *de novo* and that we are limited in fixing the value only by the assessment.

We do not sustain this contention. In *Tax Assessment Appeals*, 11 Haw. 235, 236, the court said: "A tax appeal occupies about the same position as an equity appeal in this court. \* \* \* Of course, this court can in no case place a valuation outside of the limits fixed by the appeals." This is a direct holding by this court against the attorney general's contention.

In the absence of an appeal by the assessor he must be regarded as accepting on behalf of the government, for which he acts, the valuation found by the tax appeal court and we are of the opinion, and hold, that under these circumstances the valuation found by the tax appeal court constitutes the maximum valuation which this court is authorized to place upon the property.

The properties of the company are assessed in this case as a whole, said properties being combined in an enterprise

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for profit, but it becomes important to ascertain the true value of the separate items of tangible assets making up the whole in order to aid us in arriving at the true value of the enterprise as a whole.

At the hearing before the tax appeal court it was agreed that the tangible assets of the company other than (a) its growing crops, (b) land owned and (c) land leased by the company were returned at their full value and that such value was \$137,728.90. It was also agreed that the profits of the company for a number of years past have been such that if capitalized the value arrived at would not exceed \$150,000. It therefore becomes necessary for us to examine the evidence as to the value of these disputed items in order to determine the aggregate value of tangible assets of the company which is one of the most important things to be considered in arriving at the value of the company's property as a whole.

The tax appeal court found the value of the 1917 crop of cane to be \$99,320 and the value of the 1918 crop to be \$59,576.96. The company has adopted these findings as correct and we see no reason for reviewing the court's finding.

The company's return shows that it owns 1453.9 acres of cane land upon which it placed a valuation of \$50,015.15. The tax appeal court found the value of this land to be \$101,710. The assessor and his deputy have testified to a valuation of \$181,625, while the manager and secretary of the company have testified to a valuation of \$50,015.15. Each of these witnesses has attempted to demonstrate the correctness of his estimate. The court did not accept either opinion, but, basing its opinion upon the recent appraisal of 663 acres of adjacent land by the government at an average value of \$70 per acre, as testified to by the company's attorney, found the value of these lands to be \$101,710.

The same witnesses, with the exception of the company's

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attorney, have given their evidence as to the value of the leaseholds of the company, the assessor urging a valuation of \$12,000, while the company's claim is that it is paying the full rental value of the land and that therefore its leaseholds have no value. As in the case of the fee simple holdings of the company the witnesses attempted to demonstrate the correctness of the conclusions reached but the court found neither one correct and fixed the value at \$4500.

The tax appeal court accepted the agreement of the company and the assessor as to the value of its properties, other than those items the value of which is disputed, at \$137,728.90, to which it added the amounts found by it to be the value of the crops and land and thereby arrived at a valuation of \$402,835.86, at which amount it fixed the assessment as a whole.

"This court has uniformly held that it does not reduce or increase the valuation made by a tax appeal court which appears to be fair and just, but allows it to stand unless shown to be erroneous, or based on a wrong theory or insufficient or defective data" (*Tax Assessor v. Wailuku Sugar Co.*, 18 Haw. 422, 423).

In this case, while a lower valuation by the tax appeal court might properly have been sustained, we do not feel at liberty upon the evidence to lower it. It is the duty of the tax appeal court to value the property in accordance with the facts before it, using its own common sense and its knowledge of existing conditions. The presumption is that the decision of the tax appeal court is correct and its findings of value should not be lightly overturned (*Hawi M. & P. Co. v. Forrest*, 21 Haw. 389; *Tax Assessor v. Wailuku Sugar Co.*, *supra*).

We find nothing in the record requiring a reduction of the valuation.

The decision appealed from is therefore affirmed.

*W. L. Stanley* for the taxpayer.

*A. G. Smith*, Attorney General (*C. S. Franklin*, Deputy Attorney General, on the brief), for the assessor.

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TERRITORY v. LIONEL R. A. HART.

No. 1083.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

HON. W. H. HEEN, JUDGE.

ARGUED MAY 20, 1918.

DECIDED MAY 29, 1918.

COKE, C. J, QUARLES AND KEMP, JJ.

APPEAL AND ERROR—*exception—harmless error.*

A motion by defendant at the close of the prosecution's case for an instructed verdict in his favor is equivalent to a demurrer to the evidence and where the motion is erroneously overruled the error becomes harmless if the defendant fails to rest his case on the evidence for the prosecution and introduces evidence in his own behalf which, with the evidence for the prosecution, justifies the verdict against him.

EMBEZZLEMENT—*control by accused with owner's consent.*

Where the defendant buys stock on margin for a client and controls the account therefor, the client instructing him to hold accruing dividends to accumulate and apply on the purchase price and to not sell the stock, the control of the stock is in the defendant with the consent and authority of the owner within the meaning of the provisions of the statute defining embezzlement.

SAME—*conversion—use and benefit of accused.*

The defendant bought capital stock of a corporation for a client on margin from a broker in New York; the defendant controlled the account for the stock with the consent of his client and without the latter's consent had the account for the stock sold and the realization therefor credited to another account for which defendant was liable: Held, that the conversion was for the use and benefit of the defendant within the meaning of the statute defining embezzlement.

SAME—*jurisdiction.*

Where the defendant, operating in the Territory of Hawaii, cabled from Honolulu to New York directing a broker in New York to sell certain stock which was in his control for a client, the proceeds of which defendant embezzled, the crime being com-

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menced in the Territory of Hawaii the trial court in Hawaii has jurisdiction to indict, try and punish the defendant for such crime.

*EVIDENCE—criminal law—cross-examination of accused.*

Where a defendant takes the witness stand in his own behalf he may on cross-examination be asked about any matter pertinent to the issues although he has not testified on direct examination as to all of the things about which he is asked.

## OPINION OF THE COURT BY QUARLES, J.

The defendant was indicted in the circuit court of the first circuit charged with embezzling certain moneys intrusted to his care and keeping by the owner, O. A. Bierbach, without the consent of said owner. At the trial evidence was introduced tending to prove the following facts: The defendant, a stockbroker in Honolulu, was dealing with Stoneham & Co., brokers of New York City, carrying a large number of accounts for others, among them one for Mr. Bierbach. February 1, 1916, Bierbach, through the defendant, purchased 20,000 shares "Wilbert mining stock" on margin, paying thereon \$650—one-third of the purchase price. This was a dividend-paying stock, paying a dividend of \$200 quarterly, and the Bierbach account was credited with dividends thereon as follows: \$200 February 15, \$200 May 15, and \$200 August 15, 1916. The account was controlled by defendant, Bierbach having no dealings directly with Stoneham & Co. touching it. Bierbach instructed the defendant to hold the dividends accumulating so as to apply on the balance of purchase price of the stock and instructed him to not sell the stock without orders so to do. Upon one occasion the stock dropped on the market and on demand of Stoneham & Co., through the defendant, Bierbach made, through the defendant, a payment of \$50 or \$60 on account of this Wilbert mining stock. October 15, 1916, Stoneham & Co., on cabled order from the defendant, sold this stock for the sum of \$532.38 and transferred the Bierbach ac-



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count to the account of W. T. G. Allen. This sale and transfer were made without the knowledge or consent of Bierbach and contrary to the directions that he had theretofore given the defendant. Bierbach had informed the defendant that when the stock was fully paid off he wanted the certificate therefor brought to Honolulu. In November, 1916, Bierbach saw the defendant and had a talk with him about the stock and in the conversation defendant told him that he would bring the stock home soon. About two weeks after this conversation the defendant left Honolulu and went to Japan. The following July the indictment in this case was presented by the grand jury and in the same month the defendant was arrested in San Francisco on the charge contained in the indictment. At the time of his arrest the defendant admitted that he had destroyed his books three days before he left Honolulu; that he converted to his own use the value of the Bierbach stock and some stocks belonging to others; that he ran away to Japan to avoid arrest and said he would plead guilty. This confession or admission was made in the presence of Chester A. Doyle and Arthur McDuffie in San Francisco. McDuffie says that defendant admitted that he embezzled the stocks, while Doyle says he admitted that he embezzled the value of the stocks. Both of these witnesses testified that defendant admitted that he had destroyed his books three days before leaving for Japan; that he went to Japan to avoid arrest; that he would waive extradition papers and would return to Honolulu and plead guilty to the charge of embezzlement. The accounts handled by defendant with Stoneham & Co. were controlled by defendant except in a few cases where the parties had the control taken from defendant and dealt directly with Stoneham & Co. Mr. Allen, to whom the Bierbach account was transferred, testified that he had had business transactions with defendant since 1911

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and had bought through defendant in October, 1916, some Montana-Bingham stock; that defendant told him that he had opened an account for him with Stoneham & Co. and had bought some stock for his little girl, but witness had never exercised any control over the account. Witness testified that he had made cash advances to the defendant in 1912 but had told defendant not to consider them as loans.

During the progress of the trial the prosecution elected to prosecute defendant on the charge of embezzling the Wilbert mining stock and not the proceeds of the sale thereof (see Sec. 3796 R. L.), the correctness of which has not been questioned by the defendant.

At the close of the case for the prosecution the defendant moved for an instructed verdict in his favor on the grounds: That the evidence outside of the confession testified to did not establish the *corpus delicti*; that the charge as laid in the indictment had not been proven; that there is a variance between the allegations of the indictment and the proofs in that the indictment charged that Bierbach was the owner of the moneys alleged to have been embezzled and the proofs show that Stoneham & Co. were the owners; that the evidence shows that the defendant was never intrusted with or had possession, control, custody or the keeping of the moneys alleged to have been embezzled with the consent or authority, direct or indirect, of the owner; that the alleged owner refused to intrust the defendant with the possession, control, custody or keeping of said moneys alleged to have been embezzled; that there is no evidence that defendant ever had possession, control or custody of the moneys alleged to have been embezzled or that he ever converted the same to his own benefit; that if the evidence shows that said defendant converted said moneys that he did so for the benefit of another; that if any conversion was proved it

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occurred in New York and not in the Territory of Hawaii; that the evidence fails to show that the moneys alleged to have been embezzled amounted to a valuable security within the meaning of the statute "but were merely accounts or credits on the books of a stock-broker firm." This motion was denied, to which the defendant excepted.

Mr. Lymer, attorney for defendant, took the stand as a witness, and among other things testified that he took a letter to Stoneham & Co. in New York in June, 1917, which letter was introduced in evidence as defendant's exhibit A, and that both Mr. Stoneham, and Mr. Robertson of Stoneham & Co., admitted that the letter was written by Stoneham & Co. Witness offered to testify that while in New York he investigated the reputation of Stoneham & Co. as brokers and found that it was bad and that they ran a bucket shop, but on objection this evidence was not admitted, to which the defendant excepted.

Testifying in his own behalf the defendant admitted sending the cable to Stoneham & Co. October 15, 1916, ordering them to close out the Bierbach account and transfer the realization therefor to the account of Allen; that for two or three months prior to sending this cablegram his relations with Stoneham & Co. had been strained; that owing to a decline of stock on the market a great many margins had to be increased and Stoneham & Co. threatened to throw out all of the accounts handled by him, good and bad, if the accounts were not all made good; that Stoneham & Co. held him personally responsible for all of the accounts handled by him; that his purpose in transferring the accounts of Bierbach and other clients to other parties was to try to save the good accounts as he was being threatened with the sale of all the accounts, good and bad. On cross-examination he testified that he did not inform Bierbach that he had closed the account;

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that he destroyed his books before leaving Honolulu; that he closed his account with Stoneham & Co. in 1916, but could not remember the exact date; that it was a large account in the neighborhood of \$30,000, \$40,000 or \$50,000, roughly speaking, and that he did not owe Stoneham & Co. anything when he closed his account with them.

At the close of the case the defendant renewed his motion for a directed verdict, which was overruled. The jury returned a verdict of guilty as charged and the defendant moved for a new trial raising therein every question raised by the motion for a directed verdict and by all of the exceptions taken up to that time.

The case comes here on exceptions, thirty-two in number, many of which are not of sufficient importance to discuss or mention, and we will not state any of the exceptions in full but treat all of them that we deem of importance, in a general way.

The exceptions to various rulings upon the motions for a directed verdict, to the verdict and to the order denying the motion for a new trial, that the evidence does not show that the defendant had been vested with the custody or control of the Wilbert mining stock "by the consent or authority of O. A. Bierbach, the owner thereof," are not sustained. The evidence for the prosecution shows that the defendant was vested with the control of the stock. Bierbach operated through the defendant and had no communications whatever with Stoneham & Co., and directed defendant to permit the dividends to accumulate and be applied on the purchase price and to not sell this stock. From such conduct the consent of the owner to the control of the stock by defendant is sufficiently shown. It would have been utterly foolish for Bierbach to have given these instructions if defendant was not controlling the stock and these instructions sufficiently evince the consent of Bierbach that defendant should control such stock.

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Having control of the stock with the consent and authority of the owner defendant is shown by the evidence to have caused the stock to be sold. This was a conversion of the stock. It was argued that the conversion was not such as is prohibited by the statute. It was fraudulent, without authority, and done clandestinely so far as the owner's knowledge, and the facts touching the sale of the stock were fraudulently concealed from the owner.

Was it converted to the use and benefit of the defendant? The proceeds of the sale were by order of the defendant credited to the account of one in whose name the defendant was dealing and for whom he had at or about that time bought some Montana-Bingham stock, and who had made advances to the defendant. If he was owing Allen and had his account credited with the proceeds of the sale of the stock he was benefited; if he was not owing Allen but was liable to Stoneham & Co. for the Allen account he was benefited. In either event he converted the stock and converted the realization from the stock to his own use and benefit. He used it either to apply on his indebtedness to Allen or to protect his liability on the Allen account, and in either case he was benefited and Bierbach was injured. Looking at it from any viewpoint the defendant converted the Wilbert mining stock owned by Bierbach to the defendant's use and benefit. By his confession he admitted the embezzlement and should not escape the penalty therefor on the pretense that he converted the proceeds of the stock to the use of another.

The exception to the ruling denying a directed verdict at the close of the evidence for the prosecution must be overruled. The defendant by failure to rest his case on the evidence then admitted, and by introducing further evidence, strengthened the case against him. The request for a directed verdict, like a motion for nonsuit, is in the nature of a demurrer to the evidence and if the motion or demur-

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rer is denied when it should be granted and the defendant by introducing further evidence completes the case against him, the error in overruling the motion or demurrer becomes harmless. The defendant by evidence showed that he controlled all of the accounts handled by him with Stoneham & Co., many in number; that he was held responsible for all of them by Stoneham & Co., and that without the knowledge or consent of Bierbach he had the Wilbert mining stock sold and the realization therefor transferred to the account of Allen at a time when his relations with Stoneham & Co. were strained, and Stoneham & Co. were threatening to sell all of the accounts handled by him, good and bad, and that he did so for the purpose of trying to save the good accounts. Under these circumstances the jury might well have found that the defendant embezzled the Wilbert mining stock (which he had controlled with the consent and authority of Bierbach, the owner), and that he converted the same to his own use and benefit without the consent of the owner.

The argument that the evidence fails to show that the stock was actually in the control of defendant, made with considerable earnestness, must fall in the face of the proven circumstances. Statements of account sent defendant by Stoneham & Co., and introduced in evidence with the consent of the defendant, showing that Bierbach had to his credit "Long-20000 Wilbert" strengthen the statement of Bierbach that he bought, through defendant, from Stoneham & Co. on margin 20,000 shares of Wilbert mining stock. It is true that no witness testified to having seen the stock in the actual possession of Stoneham & Co. This was not necessary so long as the evidence points to the fact that the stock was there with them. A broker who buys stock for a client on margin is required by law to keep the stock on hand and not to sell the same without the consent of the client (9 C. J. 546). It is well settled in New York,

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where the transactions involved were consummated, that where brokers sell stock to a customer on margin the legal title to the stock is in the purchaser and the brokers are pledgees thereof for the repayment of all advances made by them in connection with the transaction, the accruing dividends going to the purchaser (*Rothschild v. Allen*, 86 N. Y. S. 42; affirmed 180 N. Y. 561). We adopt and follow the New York rule which would certainly bind the parties to the transactions in a civil action commenced and prosecuted in the State of New York. The defendant was the agent of Bierbach in the transaction with Stoneham & Co., of which fact the latter had notice. Where the defendant, acting as a broker, purchases by order of a client certain stocks on margin from a broker in New York for his client a fiduciary relation exists between the defendant and his client, the title to the stock purchased vests in the client, and a conversion of the stock by defendant to his own use and benefit, without his client's consent, is embezzlement.

The statements of account sent by Stoneham & Co. to defendant and introduced in evidence, and the crediting thereon of dividends paid on the stock, in the absence of any showing to the contrary, raises the proper and necessary inference that the stocks were in the hands of Stoneham & Co. for Bierbach on October 14, 1916, when defendant ordered them sold and the jury were justified in finding that the stocks were in the control of the defendant at that time. The motion for a directed verdict at the close of the case was properly denied.

The exceptions that the evidence of the confession of the defendant found in the testimony of Doyle and McDuffie was improperly admitted for the reason that the *corpus delicti* had not been proven and the motion of defendant to strike out this evidence should have been sustained must be overruled. The evidence, other than that proving the

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confession, was sufficient to show *prima facie* that the crime of embezzlement had been committed and the confession was an admission that the defendant was the person who committed the crime. Where there is evidence sufficient to show *prima facie* that the crime alleged in the indictment has been committed the confession by the defendant that he committed the crime is admissible to connect him with the crime and to corroborate the evidence proving the commission of the crime (*Republic v. Tokuji*, 9 Haw. 548, 551, 552).

Some of the exceptions are to rulings of the court in refusing to permit a witness for defendant to answer certain questions. There is no showing by offer of proof or otherwise as to what the answers to these questions would be. Such exceptions are without merit (*Yim Fat v. Gleason*, ante p. 210).

There is no merit in the exception that the court refused to admit evidence tending to show that the business reputation of Stoneham & Co. in New York is bad or that they run a bucket shop and are considered unreliable. The evidence shows that this firm by direction of defendant sold the Wilbert mining stock and realized money therefrom and credited the realization, as directed by defendant, and whether honest or dishonest, reliable or unreliable, their commercial standing in no way affects the guilt or innocence of the defendant.

Objections by counsel for defendant were properly overruled to questions asked the defendant on cross-examination eliciting from him statements tending to show the following facts: That he burned his books before leaving Honolulu for Japan; that he was speculating in stocks on margin through Stoneham & Co. in 1916; that he closed out the Archer, McInerny and Bierbach accounts to protect other accounts, and the realization from the Bierbach account was \$532.38.



## Opinion of the Court.

There is no merit in the exception to the court's overruling defendant's objection to a question asked defendant on cross-examination touching the amount of realization from the sale of the accounts, other than that of Bierbach, which Stoneham & Co. were carrying on credit of defendant, especially as defendant did not state the amounts, saying he did not remember. Where a defendant takes the witness stand in his own behalf he may, on cross-examination, be asked about any matter pertinent to the issues although he has not testified on direct examination as to all of the things about which he is asked. In some jurisdictions statutes are in force which confine the cross-examination of a defendant in a criminal case to matters about which he has testified on direct examination, but we have no such statute and it is a matter within the discretion and control of the trial court which should see that the defendant is treated fairly. This discretion does not appear to have been abused in this case.

The contention of defendant that if the crime charged is proven by the evidence, that it was committed in New York, and not in the Territory of Hawaii, cannot be sustained. Defendant was operating in Honolulu and from Honolulu cabled the order to sell the stock owned by Bierbach. The crime was commenced in Honolulu and consummated in New York, and the trial court had jurisdiction to indict, try and punish defendant for the crime charged.

We have carefully considered the exceptions of defendant to certain instructions given, although we are unable to ascertain from the record whether the entire charge of the court to the jury is before us or not, and find no reversible error therein. The court properly gave the statutory definition of embezzlement. The instructions given, which are in the record, left to the jury the determination of the facts and contained the usual safeguards of defend-

## Opinion of the Court.

ant's rights. Under those instructions the jury had to find every material fact necessary to show defendant's guilt and we find nothing in the instructions prejudicial to the defendant. The jury were told that they must find that the defendant had control of the 20,000 shares of Wilbert mining stock by consent and authority of the owner, Mr. Bierbach, and that he converted the same to his own use and benefit without the consent of such owner. There was evidence showing that defendant was held responsible for all accounts handled by him, including the Allen account, and that he was handling the Allen account of his own volition, and there is no evidence showing that when he closed out with Stoneham & Co. in 1916 that he did not close out the Allen account also; and there is no evidence that Allen was benefited by receiving any part of the realization on the Wilbert stock which the defendant is charged with having embezzled. The Bierbach account as shown by the evidence in this case consisted alone of the Wilbert mining stock transaction, and the cabled instruction of the defendant to sell the account was an instruction to sell the stock. The defendant contends that upon no hypothesis other than the presumption that defendant realized on the Allen account can some of the instructions be sustained. We do not think so as under the evidence it is not a mere presumption but a proven fact that defendant was controlling the Allen account and liable therefor to Stoneham & Co. The proven circumstances, some of which are adverted to herein, we think authorized the jury to find that the defendant converted the Wilbert mining stock owned by Bierbach to his own use and benefit. The verdict was authorized and the motion for a new trial was properly denied.

The exceptions are overruled.

*C. S. Davis*, Second Deputy City and County Attorney,  
for the Territory.

*W. B. Lymer* for defendant.

Syllabus.

KAAHANUI v. DAVID KAOHI.

No. 1070.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

HON. S. B. KEMP, JUDGE.

ARGUED MAY 31, 1918.

DECIDED JUNE 1, 1918.

QUARLES J., AND CIRCUIT JUDGES ASHFORD AND EDINGS IN  
PLACE OF COKE, C.J., AND KEMP, J., DISQUALIFIED.

**COTENANCY—*adverse possession.***

The plaintiff, who held the legal title to less than one-half of the land in controversy and which was owned in cotenancy, actually occupied for more than forty years about one-half of the land claiming a one-half interest therein (the other half being occupied by a cotenant, admitted to be the owner thereof,) by such adverse possession and user acquired title to a small interest in the land the title to which otherwise would have been in a third cotenant who did not during the time claim any interest in the land.

**SAME—*same.***

One cotenant in common may acquire the title of a cotenant by adverse possession where the one ousts the other and claims the title which the other held, all of the necessary elements of adverse possession being present.

**OPINION OF THE COURT BY QUARLES, J.**

This is an action to quiet title under the statute. The plaintiff claims in his complaint title to all of a certain described tract of land which descended from Piko, the original awardee, who died intestate in 1853, leaving no children surviving him, the land going one-half to his wife who survived him and the other half to four nephews and nieces, of whom the plaintiff is one. The widow died soon after the death of Piko leaving surviving her a daughter, Pakina, from whom the defendant has succeeded to the

## Opinion of the Court.

one-half interest inherited by his grandmother from Piko. Of the nephews and nieces two died without issue, their interests going to the remaining two, Kaahanui, the plaintiff, and Kahahana. Kahahana died leaving a daughter, Niau, who died leaving a son, Kaimiola. In his answer the defendant denied that title was in plaintiff and claimed title in himself to all of the land. The court found the facts as to the descent of the land as above stated and further found: "In 1869 prior to the death of Kahahana through whom the disputed interest must come the plaintiff went into possession of a part of the land claiming to be the owner of an undivided one-half interest therein (the remainder being occupied by Pakina the then owner of the other one-half interest). There was then and has at all times since been two sets of improvements on the land. One set has been occupied continuously by the plaintiff together with about one-half of the land and the other set together with the remaining land has been continuously occupied by Pakina and her descendants." The court also found that Kaimiola deeded in 1913 to the defendant his interest in the land under which deed the defendant claims an undivided one-fourth interest in the land, which, added to the one-half admitted to be owned by him, makes an undivided three-fourths interest in the land in him if his claims are sustained. The court decided that the interest which has or would have descended to Kaimiola was lost to him and vested in the plaintiff by adverse possession and adjudged the plaintiff to be the owner of an undivided one-half interest in the land, and judgment to that effect was duly entered. To the decision and judgment the defendant excepted and the cause comes here upon exceptions.

The defendant contends that the decision is erroneous for the reason that the plaintiff being a cotenant in common and admitting the cotenancy of defendant, the occupancy of plaintiff and defendant being a joint occupancy

## Opinion of the Court.

or as tenants in common, plaintiff cannot rely on such occupancy as being exclusive and adverse to the third tenant in common, and this presents the only question calling for our decision.

That one tenant in common may acquire the title of a cotenant by adverse possession is well recognized (*Nahinai v. Lai*, 3 Haw. 317; *Kauhikoa v. Hobron*, 5 Haw. 491; *Aiona v. Ponahawai Coffee Co.*, 20 Haw. 724) where the one ousts the other and claims the title which the other did hold, all of the necessary elements of adverse possession being present. Here the plaintiff occupied and claimed about one-half of the land under claim of ownership of a one-half interest for a period of nearly fifty years, the defendant occupying and claiming the other half until 1913, when the defendant obtained a deed from Kaimiola who it is not found ever prior to that time claimed any interest in the land. We are bound by the facts found by the trial court and cannot presume the existence of any fact not shown in the findings as the evidence is not before us, for which reason that part of the exception to the decision that it is contrary to the evidence cannot be considered. We think that the decision and judgment are correct and that the plaintiff has succeeded by long continuous adverse possession and user to the interest which otherwise would have passed to Kaimiola and from him, by virtue of his deed made in 1913, to the defendant. All of the elements of adverse possession, according to the findings of fact made by the trial court, were present. The plaintiff, who held the legal title to less than one-half of the land in controversy and which was owned in cotenancy, actually occupied for more than forty years about one-half of the land claiming a one-half interest therein (the other half being occupied by a cotenant, admitted to be the owner thereof,) by such adverse possession and user acquired title to a small interest in the land the title to which otherwise would have been in

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a third cotenant who did not during the time claim any interest in the land.

The exceptions are overruled.

*A. Lindsay* (*Mott-Smith & Lindsay* on the brief) for plaintiff.

*E. K. Aiu* for defendant.

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HANNAH MAKAINAI *v.* SOLOMON K. LALAKEA,  
ET AL.

No. 1103.

RESERVED QUESTIONS FROM CIRCUIT JUDGE, FOURTH CIRCUIT.

HON. C. K. QUINN, JUDGE.

FILED JUNE 5, 1918.

COKE, C. J., QUARLES, J., AND CIRCUIT JUDGE EDINGS IN  
PLACE OF KEMP, J., ABSENT.

APPEAL AND ERROR—*reserved questions—returned unanswered.*

Questions were reserved to this court touching the merits of a bill in equity raised by demurrer which the court answered, advised that the demurrer be sustained and in the opinion made suggestions whereby the bill could be amended so as to entitle plaintiff to relief in equity; the plaintiff amended her bill in the court below to which amended bill the defendants demurred and the circuit judge has reserved the questions to this court touching the merits of the amended bill and which could be determined from the rules enunciated in the former opinion of this court: Held that this court will, on its own motion and in the exercise of its discretionary power, return the questions unanswered.

*Per Curiam.* This is the second time that this cause has come before us on reserved questions touching the merits

## Opinion of the Court.

of plaintiff's pleadings raised by demurrer. In the former opinion, *ante* p. 268, we stated the facts and considered the first amended bill and the demurrer thereto and advised that the demurrer be sustained. In the opinion we suggested rules by which the amended bill could further be amended so as to state a case entitling the plaintiff to relief in equity. The plaintiff amended her bill of complaint after the return of the cause from this court and the defendants have demurred to the last amended bill. Without considering and passing upon the last demurrer the circuit judge has again reserved questions touching the merits of plaintiff's pleading and of defendants' demurrer thereto to this court. A careful study of the former opinion and an application of the rules therein enunciated to the last amended bill are all that is necessary to determine whether this pleading presents a case for equitable jurisdiction and relief and we see no reason why the circuit judge should not do the work that he has requested us to do. Under the rules enunciated in the former opinion there is little, if any, room for doubt as to what action should be taken on this last demurrer. The statute, while vesting discretionary power in the matter of reserving questions to this court, did not intend that questions should be reserved unless the judge below has well founded doubts as to what the answers should be (*In re Sherwood*, 22 Haw. 385; *Territory v. Scully*, 22 Haw. 484). We might well have returned the first set of questions reserved for the decision of the circuit judge in the first instance (Sec. 2512 R. L.) but we did not do so, but of our own motion now return the pending questions reserved for the decision of the circuit judge in the first instance, and it is so ordered.

## Syllabus.

PHILOMENA SILVERHORN, ADMINISTRATRIX OF  
THE ESTATE OF ALEXANDER McLAIN, DE-  
CEASED, *v.* PACIFIC MUTUAL LIFE INSUR-  
ANCE COMPANY OF CALIFORNIA, A CORPORA-  
TION.

No. 1056.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.  
HON. S. B. KEMP, JUDGE.

ARGUED MAY 15, 17, 1918.

DECIDED JUNE 6, 1918.

COKE, C. J., QUARLES, J., AND CIRCUIT JUDGE HEEN  
IN PLACE OF KEMP, J., DISQUALIFIED.

**CORPORATIONS—*estoppel*—*waiver*.**

Where the defendant corporation by representations and promises induced plaintiff to forego her right to bring an action on a life insurance policy within one year after the death of the insured, as provided in the policy, and the company waived its right to require the payment of the premiums, and the plaintiff did, pursuant to defendant's representations and promises, refrain from bringing suit against the defendant within the time prescribed in the policy, the plaintiff thereby rendered her *quid pro quo* and defendant is estopped from requiring a compliance with said provisions in the policy.

**SAME—*same*—*same*.**

The rule is that corporations have power to waive their legal rights and are bound by waiver and estoppel like natural persons. They can claim no exemption from the operation of those rules or maxims which are established to enforce good faith and fair dealing among individuals.

**SAME—*same*—*same*—*pleading*.**

The corporation defendant having authority to make the contract of insurance in the first instance it follows that it was equally clothed with authority to waive any of the terms of the contract inserted for its protection and thereby estop itself. Where it is alleged that the company waived certain of the clauses or conditions in the policy it is proper to presume that in so doing the



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officers of the company, in the management of its affairs, possessing authority to act, complied with all of the conditions necessary to the exercise of the power of waiver.

## OPINION OF THE COURT BY COKE, C. J.

The plaintiff, appellant, is the administratrix of the estate, and was the wife, of Alexander McLain, deceased. The defendant, appellee, is a corporation organized under the laws of the State of California, represented in this Territory by the Henry Waterhouse Trust Company, Limited, a Hawaiian corporation, its agent. The plaintiff on November 24, 1915, instituted an action in assumpsit against the defendant upon a life insurance policy issued by defendant to said deceased on the 15th day of May, 1903. The policy is attached to and made a part of the complaint. Plaintiff's first complaint was demurred to by the defendant, the demurrer being sustained by the court below and again sustained by this court. See *Silverhorn v. Insurance Co.*, 23 Haw. 160. The plaintiff thereafter filed an amended complaint to which defendant interposed a demurrer which was by the court sustained. A second amended complaint was filed and a demurrer thereto was also sustained. The plaintiff comes to this court on a bill of exceptions, the single exception being to the ruling of the court sustaining defendant's demurrer to plaintiff's second amended complaint.

It is alleged in the amended complaint now before us that in the month of May or June, 1907, the said Alexander McLain was employed as a fireman on the steamer Raineer then lying at the port of San Francisco; that the said McLain disappeared and that it was reported that he had met accidental death by drowning in San Francisco bay; that coincidental with his disappearance a dead body resembling McLain in stature and physique, but owing to the action of the sea water and the exposure of the body

## Opinion of the Court.

the features of which were unrecognizable, was found floating in the waters of San Francisco bay; "that in the month of July, 1907, plaintiff, believing the said Alexander McLain to be dead, tendered to defendant said policy of insurance and applied for forms of proof of death and at the same time tendered to defendant the evidence above set out as proof of death of the said Alexander McLain, but defendant refused and neglected to supply plaintiff with forms on which to make proof of death and informed plaintiff that it, defendant, would make inquiries concerning the death of said Alexander McLain and satisfy itself thereon; shortly afterward and to wit during the month of November, 1907, defendant informed plaintiff that it was not satisfied that said Alexander McLain was dead and induced plaintiff to waive her then rights under said policy of insurance and in consideration of her doing so defendant agreed to waive payment of premiums under said policy by plaintiff and to pay to plaintiff the loss under said policy, namely, \$1000, if she, the said plaintiff, would wait for a period of seven years from the date thereof and if the said Alexander McLain was absent from his home without having been heard of during the whole of that time; plaintiff accepted defendant's offer set out in the last preceding paragraph; that the said Alexander McLain was absent from his home without being heard of for a period of more than seven years from the month of May, 1907, down to and including the commencement of this action, and plaintiff believes and is informed and on such information and belief alleges that said Alexander McLain died in the month of May, 1907; on the 8th day of July, 1914, plaintiff being induced by the agreement entered into between herself and defendant, more particularly set out in paragraph 9 hereof, by negotiations, interviews and correspondence with defendant, went to the trouble and incurred the expense of petitioning a judge of

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the circuit court of the first judicial circuit of the Territory of Hawaii, presiding at chambers in probate, and was appointed administratrix of the estate of said Alexander McLain, and thereafter, and on to wit, the 15th day of August, 1914, plaintiff qualified as such administratrix and letters of administration were issued by the said judge out of and under the seal of the said first circuit court to the said plaintiff, and plaintiff ever since has been and now is the duly appointed, qualified and acting administratrix of the estate of said Alexander McLain; in the month of November, 1914, plaintiff made and delivered to defendant, on forms supplied and prescribed by defendant, proof of death of said Alexander McLain accompanied by certified copy of said letters of administration; defendant received and examined the forms of proof of death but refused to approve the same, and contrary to the agreement set out in paragraph 9 hereof, refused to pay the loss under said policy to the plaintiff."

The amended complaint contains further allegations which in substance aver that by reason of the agreement above set forth the defendant is estopped from relying on the provision in said policy to the effect that action should be commenced within one year from the month of May, 1907, being the date of the alleged death of Alexander McLain, and further that defendant has waived the terms of said policy and its rights at law in that regard. Plaintiff further avers that the defendant waived the payment of premiums to accrue subsequent to the date of said agreement and plaintiff prays for judgment against the defendant for the sum of one thousand dollars, with interest, etc.

A second cause of action is contained in the complaint which appears to be based upon the theory that by the terms and conditions of the policy the same had a cash surrender value and that plaintiff was entitled to recover the amount

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of the cash value. The complaint contains a third cause of action which alleges in effect that plaintiff is entitled to a paid-up policy of insurance in an amount to be ascertained.

The second cause of action was disallowed by this court in *Silverhorn v. Insurance Co.*, *supra*, which opinion we approve, and the third cause of action we consider equally without merit and we hold that the demurrer to both the second and third causes of action, as contained in plaintiff's complaint, was properly sustained. We are then left to deal solely with the first cause of action.

By reference to the record it will be readily seen that the case is now before us on allegations differing materially from those contained in the original complaint which were passed upon by this court in *Silverhorn v. Insurance Co.*, *supra*. The allegations of the amended complaint must for the purpose of this opinion be taken as confessed. It is urged by the plaintiff that the defendant having in November, 1907, induced plaintiff to forego her then rights under the policy and to wait for a period of seven years under defendant's promise that if during that period McLain was not heard of the insurance would be paid, and the further representation of the defendant, made at that time, that during said period defendant would not require the payment of any premiums which might become due under the policy, constituted a waiver of the right of the defendant to require that the action should be commenced within one year of the date of the death of the insured and that plaintiff is estopped from pleading said clause in the policy as a bar to the action. And for the same reason plaintiff contends that the defendant has waived its right to require the payment of the premiums and is estopped from claiming a forfeiture of the policy by reason of the nonpayment thereof under the clause in the policy which provides that the policy shall lapse and be void if any premium is not

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paid as therein provided. The policy provides: "Only the president or a vice-president together with the secretary or assistant secretary have power in behalf of the company to issue permits to make or modify this or any contract, or to extend the time for paying any premium, and the company shall not be bound by any promise or representation heretofore or hereafter given by any persons other than the above named, conjointly as stated, nor unless such permits, modifications or extensions are in writing." Under this provision it would appear that modifications or extensions of time for payment of premiums might be made by some other agency, so long as that agency had a permit to act from the officers mentioned.

It is vigorously urged by the defendant that the absence of any allegation in the complaint that the waivers or modifications had the assent of either the president or vice-president in combination with the assent of the secretary or assistant secretary, and the absence of a further allegation that such waivers or modifications were in writing, renders the complaint fatally defective. The complaint does not specify by what officers or other representatives of the company the waivers or modifications were made nor whether the same were in writing or otherwise. The allegations simply designate the defendant, which of course means the Pacific Mutual Life Insurance Company of California, a corporation, as the party making the waivers. The principles of the law of waiver and estoppel require consideration here in order to arrive at a proper solution of the questions at issue. A waiver is defined as the failure to insist upon some right, claim or privilege and a foregoing or giving up of some advantage which but for such waiver the party would have enjoyed. A waiver takes place where a man dispenses with the performance of something which he has a right to exact and is a technical doctrine introduced and applied by the courts for the

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purpose of defeating forfeitures. Estoppel is the inhibition to assert a right from the mischief that has resulted or might follow. Waiver belongs to the family of estoppel yet they are distinguishable. They are, however, frequently used in cases as convertible terms, especially as applied to the law of insurance contracts in the avoidance of forfeitures. See 40 Cyc. 252-256. To constitute estoppel *in pais* the party against whom it is sought to be enforced must have made some representation the effect of which would be to influence the conduct of the one seeking to enforce the estoppel and induce him to change his position so as to materially injure him if the party making the representation is allowed to deny its truth. *Pope v. Ferguson*, 83 Atl. 353; *Webber v. Ingersoll*, 104 N. W. 600. We understand the rule to be that corporations have power to waive their legal rights and are bound by waiver and estoppel like natural persons. They can claim no exemption from the operation of those rules or maxims which are established to enforce good faith and fair dealing among individuals.

If it is true that the defendant in this case, as alleged, by representations and promises induced plaintiff to forego her right to bring an action on the policy in suit within one year after the death of McLain and also waived its right to require the payment of premiums and the plaintiff did, pursuant to defendant's representations and promises, refrain from bringing suit against defendant within the time prescribed in the policy, the plaintiff thereby rendered her *quid pro quo* and defendant is estopped from requiring a compliance with those clauses in the policy—the one requiring suit to be brought within one year after the death of the insured and the other providing for a forfeiture of the policy in case the premiums were not paid. *Hale v. Union Mutual Fire Ins. Co.*, 64

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Am. Dec. 370; *Westchester Fire Ins. Co. v. Earle*, 33 Mich. 143.

While municipal or governmental corporations are held to a strict exercise of their powers it has been held that they may waive the terms of their written contracts and be estopped thereby. A county in Illinois, a subscriber to stock of a railway company, agreed to extend the time for completing the road from that originally fixed to a particular date. Before that date the county by its proper officers declared the road completed to its satisfaction, delivered its bonds and received the stock of the company in return therefor. Held, its action constituted a waiver and estoppel which prevented it from raising the objection that the contract was not performed in time. *County of Randolph v. Post*, 93 U. S. 502. Where contracts were required by a Federal statute to be in writing it has been held that this requirement might be departed from in those very particulars where writings are most important and still the Federal government would be bound. Where a contract was made for the delivery of a large amount of supplies by a given date, but which were not delivered by that date but long afterwards, it was held that the statute was not infringed by accepting these supplies after the date stipulated for delivery and that a verbal agreement to extend the time of performance was valid. *Salomon v. United States*, 19 Wall. 17. See also *Pixley v. Western Pac. Ry. Co.*, 91 Am. Dec. 623. In the last case cited the charter of a railroad company provided that "No contract shall be binding on the company unless made in writing." The plaintiffs were attorneys and were employed by verbal agreement merely to conduct litigation. They did so and then sued for their fees and the company defended on the ground that the contract was not in writing. Commenting upon this case the supreme court of California said: "It is probable that the first impulse that rises in every mind



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is to say that if such defense is law it is none the less rascality," and the court held that the contract having been executed, and the corporation having received the consideration it could not escape the liability.

In the case at bar the plaintiff accepted the terms imposed by defendant and complied therewith. The defendant received the consideration and it should not now be permitted to escape liability. If corporate transactions are void because the prescribed form is not pursued it does away with much of the law of implied contracts as it relates to such objects. That corporations are liable upon implied contracts, even where it is required that they should be expressed, is too well settled to dispute. 2 Kent's Com. 291; *City of Cincinnati v. Cameron*, 33 Oh. St. 365.

The final question is whether the complaint is fatally defective because of the absence of an allegation that the waivers were made by the officers and in the manner provided for in the policy. The allegation in the complaint that the waivers were the act of the defendant carries with it the assumption that the same were not only committed by the proper officers or representatives of the company clothed with authority to act but that all necessary steps were taken in order to make the corporate act legally operative.

The defendant relies largely upon the decision of the Supreme Court of the United States in *Northern Assurance Co. v. Grand View Building Association*, 183 U. S. 308, and while that opinion was the expression of a divided court we have no quarrel with the views expressed therein. But it must be borne in mind that while that case had to do with proof, we are dealing with pleadings. The court in that case, in referring to a clause providing against additional insurance, held that such a condition in the policy was one which, *unless waived*, should have been complied



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with. In the opinion the court quotes with approval the decision in *Insurance Co. v. Norton*, 96 U. S. 234, where the latter court, speaking through Mr. Justice Bradley, said: "The written agreement of the parties, as embodied in the policy and the indorsements thereon, as well as in the notes and the receipt given therefor, was undoubtedly to the express purport that a failure to pay the notes at maturity would incur a forfeiture of the policy. It also contained an express declaration that the agents of the company were not authorized to make, alter or abrogate contracts or waive forfeitures. And those terms, had the company so chosen, it could have insisted on. But a party always has the option to waive a condition or stipulation in his own favor. The company was not bound to insist upon a forfeiture, though incurred, but might waive it." And again in the *Northern Assurance Company* case the language of Mr. Justice Field, employed in *Insurance Company v. Wolff*, 95 U. S. 326, to the following effect, was used and adopted: "The conditions mentioned in the policy could, of course, be waived by the company either before or after they were broken; they were inserted for its benefit and it depended on its pleasure whether they should be enforced." And again it is said in the *Northern Assurance Company* case: "Insurance companies may waive forfeiture caused by non-observance of conditions; that, where waiver is relied on, the plaintiff must show that the company, with knowledge of the facts that occasioned the forfeiture, dispensed with the observance of the condition; that where the waiver relied on is an act of an agent, it must be shown either that the agent had express authority from the company to make the waiver, or that the company subsequently, with knowledge of the facts, ratified the action of the agent."

In the case at bar, the corporation having authority to make the contract in the first instance it follows that it

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was equally clothed with authority to waive any of the terms of the contract and thereby estop itself. The policy issued by the company contained various clauses and conditions inserted for the protection of the company. It is alleged in the complaint that the company waived certain of these clauses or conditions and it is proper to presume that in so doing the officers of the company in the management of its affairs, possessing authority to act, have complied with all of the conditions necessary to the exercise of the power of waiver. We think the allegations of the complaint are sufficient to maintain the action.

The exception to the order of the court sustaining defendant's demurrer is hereby sustained and the cause is remanded to the court below for further proceedings consistent with this opinion.

*H. Edmondson* (*E. C. Peters* with him on the brief) for plaintiff.

*A. L. Castle* and *Marguerite Ashford* (*Castle & Withington* and *Marguerite Ashford* on the brief) for defendant.

Syllabus.

UNITED CHINESE SOCIETY, BY CHU GEM, GOO KIM FOOK, HO FON, TONG KAU, CHONG PAK SUN, PANG LUM MOW, WONG HOW, YEE MUN WAI AND M. C. AMANA, ITS TRUSTEES, AND CHU GEM, GOO KIM FOOK, HO FON, TONG KAU, CHONG PAK SUN, PANG LUM MOW, WONG HOW, YEE MUN WAI AND M. C. AMANA v. YEE YAP, LAU TONG, YONG KWONG TAT, LEE CHUCK, LAM YAT KEUNG, LEE LAU, WONG SAI KUEN, C. F. ZEN AND CHIN CHAU.

No. 1079.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

HON. S. B. KEMP, JUDGE.

ARGUED MAY 27, 1918.

DECIDED JUNE 22, 1918.

COKE, C. J., QUARLES J., AND CIRCUIT JUDGE EDINGS  
IN PLACE OF KEMP, J., DISQUALIFIED.

COURTS—*authority—quo warranto.*

Where on a *quo warranto* the court or judge has authority "to direct the corporation to proceed to a new appointment" to fill a vacancy existing in the board of trustees of the corporation the court or judge likewise possesses the authority to require an election to be held by the members of the society for that purpose and generally to supervise and govern that election.

SAME—*same—same.*

Where power is conferred upon a court or judge to direct that a certain thing be done the court or judge is inferentially clothed with authority to require the performance of all acts preliminary or incidental to the accomplishment of the ultimate result.

OPINION OF THE COURT BY COKE, C. J.

The petitioners, appellees, filed in the court below a petition for a writ of *quo warranto* for the purpose of test-

## Opinion of the Court.

ing the right of respondents to membership on the board of trustees and the right of respondents to act as officers of the United Chinese Society. This society is in the nature of a charitable or benevolent corporation organized and existing under the laws of the Territory of Hawaii and has a large membership composed of Chinese residents in the Territory.

This controversy was before us on a prior occasion (see *Yong Kwong Tat et al. v. Yee Mun Wai et al.*, 22 Haw. 604) where a history of this case, unnecessary to be repeated here, will be found. After hearing the cause the judge of the court below rendered his decision wherein he found in substance that the officers of the society, to wit, the president, vice-president, secretary, assistant secretary, treasurer and assistant treasurer having resigned their respective offices in the year 1913 that all of said offices are vacant and that at present none of the contending parties to this cause are entitled thereto. The judge further found that the board of trustees consisted of fifteen members and that fourteen members thereof were duly elected, qualified and acting; that the one vacancy in the board of trustees occurred by reason of an attempt by the society at its annual election in 1913 to elect one Chu Gem a trustee for the term of three years. Chu Gem at a prior election had been elected a trustee and his term of office under the prior election did not expire until January, 1915. The trial judge further held that the trustees, while elected only for the term of three years, continued in office after the expiration of their terms and until their successors were elected. It will thus be seen that Chu Gem continued in office under his first election and that his second election to the trusteeship was a mere nullity. While both sides claimed the right to this trusteeship the trial judge held that neither was entitled thereto and ordered a meeting of the trustees of the society to be held at

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a fixed date and place, after proper notice, and ordered that at the meeting the trustees should elect any additional trustee or trustees necessary to complete said board of fifteen members and thereafter should proceed to the election of officers of the society to serve until the annual meeting of the society in November, 1918. A decree conformable to the decision was made and entered and from the decision and decree respondents come to this court by appeal.

This present controversy, as well as the former one, is the outgrowth of a dispute of many years standing as to who are the *bona fide* members of the society and as such entitled to participate in the elections held by it. The root of the trouble has its source in the fact that the original membership list or roll-book of the society is missing and that at present only an incomplete roll is in existence, and in the further fact that many of the certificates of membership, especially of the older members, have been lost. It is therefore most difficult, if not quite impossible, from the present records, to ascertain just who are the members and a fertile ground for friction and litigation is afforded. This controversy promises to become an interminable source of trouble unless some means can be devised by which a correct and complete membership roll can be prepared and it thus be definitely ascertained and determined who are entitled to participate in the elections of the society.

The by-laws of the society provide for the election of the board of trustees at the annual meeting of the society by the members thereof. The by-laws further provide that "in case of the death or disability of a trustee the remaining members of the board may at any regular meeting elect a trustee from the members of the society to fill the vacancy caused by the death or other disability of the trustee." It is undoubtedly under the authority of the paragraph just quoted that the trial judge ordered a meeting

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of the board of trustees and the election by it of a trustee to fill the vacancy then existing caused by the futile attempt to confer upon Chu Gem two trusteeships running concurrently. Where a trustee is properly elected and thereafter dies or becomes disabled so that he cannot perform the functions of the office we think that under the by-laws the remaining members of the board could properly fill the vacancy. But Chu Gem neither died nor did he become disabled after his election and his term of office under his first election did not end until January, 1915. The attempt, then, in 1913, to elect him was abortive. This situation called for the election of a trustee, not by the board of trustees but by the members of the society who alone had authority to make the selection in the first instance.

Having held that the trial judge exceeded his authority in directing the board of trustees to fill the vacancy in the board we now proceed to consider what should have been the order of the court in respect to this phase of the cause. If the party to whom the writ is directed is declared by the judge to be disqualified to fill the office of which he performs the duties or if the judge holds that the person to whom the mandate was directed has usurped the office which he holds or that he continues in it unlawfully the judge can forbid him to perform the duties and shall direct the corporation to proceed to a new appointment. See sections 2713, 2714, R. L. This court has heretofore held that where on a *quo warranto* it appears that the persons against whom the writ is directed were not lawfully elected officers of the corporation or hold office unlawfully the court or judge has power under our statute to order the corporation to hold a new election and call a meeting of the stockholders for that purpose. *Canairo v. Serrao*, 11 Haw. 22. It cannot be doubted that if the judge in the present case possessed authority "to direct the corporation

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to proceed to a new appointment" to fill the vacancy existing in the board of trustees he likewise possessed the authority to require an election to be held by the members of the society for that purpose and generally to supervise and govern that election. Where power is conferred upon a court or judge to direct that a certain thing be done the court or judge is inferentially clothed with authority to require the performance of all acts preliminary or incidental to the accomplishment of the ultimate object.

In the case at bar the trial judge should have ordered the election of a trustee to fill the vacancy in the board by the members of the society, but as a preliminary step necessary to the holding of a proper election a correct roll or list of the members of the society should be provided and the election supervised in such a manner that the court's orders would be effectively carried out.

We therefore hold that the decree of the judge of the court below should be modified so as to provide for the appointment by the judge of a commissioner clothed with power and authority to prepare a roll or list of the members of the society, such roll or list to contain only the names of the *bona fide* members, and said commissioner being authorized to issue certificates of membership to members not possessing the same and after the completion of the roll or list of membership the commissioner, after due notice, to call an election of the members of the society to fill any vacancy or vacancies in the board of trustees, said commissioner to have the general direction and supervision of such election to the end that the same may be properly and fairly conducted.

The cause is remanded with instructions to modify the decree to conform to the views herein expressed.

W. B. Lymer for petitioners.

A. G. M. Robertson (Robertson & Olson and R. W. Breckons on the brief) for respondents.

## Syllabus.

NETTIE L. SCOTT *v.* ESTHER N. PILIPO AND  
ELIZABETH K. DeFRIES, NEE PILIPO.

No. 1071.

ERROR TO CIRCUIT COURT, FIRST CIRCUIT.  
HON. S. B. KEMP, JUDGE.

ARGUED JUNE 7, 1918.

DECIDED JUNE 27, 1918.

COKE, C.J., QUARLES, J., AND CIRCUIT JUDGE HEEN  
IN PLACE OF KEMP, J., DISQUALIFIED.

LANDLORD AND TENANT—*rescission of lease—damages.*

Where a member of a hui claims a specific portion of the hui lands and leases the same to the plaintiff who is unable to get possession of the demised lands by reason of the fact that other parties are in possession and holding under the lessor the plaintiff may rescind the lease and recover damages sustained by reason of failure to obtain possession.

SAME—*hui—one member holding under another.*

One member of a hui may rent and hold from another member a specific portion of the hui lands claimed by the latter.

OPINION OF THE COURT BY QUARLES, J.

This is the third time that this cause has been before us. The first time, upon exceptions, we held that a demurrer had been properly sustained to plaintiff's first amended complaint (23 Haw. 349). The second time, upon exceptions, we held that the defendants' demurrer to the plaintiff's second amended complaint was properly overruled and that the second amended complaint constituted a cause of action in favor of plaintiff and against the defendants (23 Haw. 739). The cause is now before us upon writ of error. After trial, jury waived, the circuit court filed its decision in favor of defendants, upon which judgment was entered. Plaintiff moved for judgment



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notwithstanding the decision, which motion was denied. The plaintiff then filed a motion for new trial upon the ground that the facts found by the trial court are not sustained by the evidence, and that the findings, decision and judgment are contrary to the law and the evidence.

The former decision settled the law of this case so far as the merits of plaintiff's second amended complaint are concerned. Under the assignments of error our principal inquiry is whether the plaintiff at the trial sufficiently proved the allegations of her second amended complaint. The facts stated in this pleading appear in the decisions of this court (23 Haw. 349; 739), to which we refer. The evidence consists of a number of exhibits and the transcripts of evidence of witnesses in three different trials, all of which were introduced in the trial of this cause. We quote that part of the decision relating to the facts found by the trial court as follows:

"It is quite evident from the evidence adduced at the trial that the plaintiff was unable to get possession of any considerable portion of the area adjoining the kuleana. If, then, she was prevented from getting such possession by the lessor or those claiming by, through or under the lessor, she was legally justified in rescinding the contract of lease. The evidence, however, shows that all of those found by plaintiff in possession of portions of the land which she sought to enter, were members of the hui, and they were there under the Pilipos, but the area occupied by them was very small and probably was the patches reserved by the Pilipos in the lease."

The answer pleads the statute of limitations and among other affirmative allegations alleges that plaintiff, in an action brought in 1906 against her by the defendants to recover rent on the lease here involved, relied upon the defense of eviction from the premises by the defendants, and which they rely on as matter of estoppel of the present claim of plaintiff that she has never been able to get

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possession of the demised premises. In that action, commenced in April, 1906, it was decided that the acts of the defendants here, relied on to establish eviction, were not sufficient for the reason that plaintiff had not been in possession and therefore had not been evicted. This decision was in an action between the parties to this action, and adjudicated the question of possession by plaintiff up to the time of the commencement of that action (*Pilipo v. Scott*, 21 Haw. 609; 766). We have been unable to find any evidence in the record showing that since April, 1906, the plaintiff has been placed in possession of the demised premises or any thereof. In the former action, commenced in 1906, which was finally tried in the circuit court in 1912 and affirmed by this court in 1913 (21 Haw. 609), the only defense against the claim of the lessors for rent made by the lessee (plaintiff here) was that of eviction, and it was decided that the lessee had not been in possession and therefore had not been evicted, for which reason the defense failed. The court below in its decision correctly said: "I do not think that the plaintiff's contention that it was agreed that she was to have the use and occupancy of said definite area was seriously disputed upon the trial of the case. On the authority of *Scott v. Pilipo*, 23 Haw'n 352 I think such an agreement could be legally made. We will therefore consider this case as though the lease by its terms was for a specific area." The trial court apparently took the view that because parties who held portions of the specific area leased by defendants to plaintiff were owners of shares in the hui that they were therefore not tenants of defendants. This conclusion was error. M. F. Scott, husband of plaintiff and who, as her agent, has represented her during all of the time since the execution of the lease, testified that each of the parties on the land demised to plaintiff, with one possible exception, declared that he held under the defendants, or Miss Pilipo; and

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that they also claimed specific parcels of the common property outside of the area demised. This witness also testified that time and time again he tried to get possession for plaintiff and was prevented by these tenants of Miss Pilipo. Miss Pilipo, the defendant, testified that she did not know whether the plaintiff got possession of any of the land or not, and in her testimony showed that she had been at least indifferent as to plaintiff getting possession, if not active in preventing her from doing so. While testifying in different actions growing out of this lease Miss Pilipo admitted that the parties occupying portions of the specific lands demised to plaintiff were holding by her sufferance and were to vacate when she required them to do so. In the partition of the common lands, afterwards made, the specific lands leased by defendants to plaintiff were allotted to the defendants. These shareholders in the hui, who were occupying portions of the specific part of the common property claimed by defendants and by defendants leased to plaintiff, were tenants or licensees of the defendants, occupying with the permission of defendants and under arrangement to vacate when called on so to do by defendants. The evidence shows that it was a custom of the hui for members to claim, use and occupy specific portions of the common property. Under these circumstances if a member of the hui leases a definite portion of the hui land claimed by him and his lessee is prevented from taking possession by other tenants of the lessor or by licensees under the lessor the lessee may elect to rescind the lease and recover damages against the lessor.

When this case was before us the first time we held: "The inability of the lessee to obtain possession of the premises as a tenant in common with the other shareholders in the Hui of Holualoa constituted a breach of the covenant for quiet enjoyment if such inability was due

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to the acts of the lessors, or of persons claiming the right of possession by, through or under them; but not if they were those of other shareholders in the hui acting in their own right and not in denial of the title of the lessors, nor if they were strangers or mere trespassers" (23 Haw. 349, 353). In the last decision of this court in this case we further said: "Assuming that it was proven or admitted that in the actions for rent the defense of eviction was unsuccessfully set up, it does not follow that the plaintiff may not maintain the present action for, as shown in *Pilipo v. Scott*, 21 Haw. 609, the defense of eviction may have failed for the very reason that the lessee had never obtained possession of the demised premises or of the part as to which eviction was claimed. Under the second count of her amended complaint the plaintiff claims damages for alleged failure of performance on the part of her lessors resulting in the inability on her part to obtain possession of the premises but in disaffirmance of the lease. This is a new right of action asserted now for the first time, and the plea in bar does not show that the issue has heretofore been litigated between the parties, or that it could and should have been litigated in the former actions" (23 Haw. 739, 741).

The decision and judgment should have been in favor of the plaintiff under the evidence and under the former decisions in this court and plaintiff's motion for judgment notwithstanding the decision should have been granted. The judgment is reversed and the cause remanded to the circuit court with instructions to render a decision in favor of the plaintiff and against the defendants and to assess plaintiff's damages (she having waived her claim to damages for the value of the unexpired term of the lease) as per items following: (1) The amount of that certain judgment in favor of defendants and against plaintiff for the sum of \$2201.65 rendered in the circuit court of the

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first circuit of the Territory of Hawaii on or about January 2, 1914, and which plaintiff was compelled to pay, together with accrued costs thereon and accrued interest thereon from date of judgment; (2) the amount of that certain judgment rendered in the circuit court of the first circuit of the Territory of Hawaii on or about June 25, 1915, in favor of the defendants and against the plaintiff for the sum of \$1992.73, and which is now unsatisfied, together with the accrued interest and costs thereon; and (3) the amount of that certain judgment rendered on or about November 4, 1915, in the circuit court of the third circuit of the Territory of Hawaii in favor of the defendants and against the plaintiff for the sum of \$761, and which is unsatisfied, together with all accrued interest and costs thereon. But if the defendants herein shall file in the trial court a full release of the plaintiff upon the two last named unsatisfied judgments the respective amounts thereof with accrued interest and costs shall not be included in the amount of damages awarded to the plaintiff, otherwise the same to be included in the damages awarded to plaintiff.

*M. F. Scott* for plaintiff.

*N. W. Aluli* and *E. K. Aiu* for defendants.

## Syllabus.

SPENCER BICKERTON *v.* ELEANOR CASSIDY  
BICKERTON, A MINOR, BY E. WHITE SUT-  
TON, HER GUARDIAN, AND E. WHITE  
SUTTON, GUARDIAN OF THE ESTATE OF  
ELEANOR CASSIDY BICKERTON, A MINOR.

No. 1096.

SUBMISSION UPON AGREED STATEMENT OF FACTS.

ARGUED JUNE 26, 1918.

DECIDED JULY 1, 1918.

COKE, C.J., QUARLES, J., AND CIRCUIT JUDGE EDINGS  
IN PLACE OF KEMP, J., ABSENT.

*Wills—estate for years—repairs—insurance—taxes.*

The testatrix devised to the infant daughter of plaintiff certain real estate, known as the "home," and by a codicil to her will directed that plaintiff and his family "may enjoy the said home herein mentioned, free of rent, during the minority" of the said infant daughter: Held, (1) that plaintiff and his family take an estate for years—during the minority of said infant daughter—in the home place, and not a mere license to occupy the same, and may lease the said home place and collect the rents therefor; (2) that plaintiff and his family take such estate for years subject to the burden of usual repairs, and additions made to the house by plaintiff voluntarily, which result in the direct benefit of himself and family, cannot be recovered by him against the estate of his said infant daughter; (3) that plaintiff has an insurable interest in the improvements on said "home" and may insure the same or not as he sees fit; (4) that the infant daughter has an insurable interest which the guardian may insure at the expense of her estate; (5) that for the purposes of taxation the estate for years should be assessed to plaintiff and his family and the interest of the infant daughter should be assessed as against her guardian, each party to pay the taxes assessed to him respectively.

OPINION OF THE JUSTICES BY QUARLES, J.

This is an original case submitted upon an agreed statement of facts to determine the rights of the parties as to

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the use and occupation of certain property, the duty of making and paying for repairs, and of paying taxes and insurance thereon. By her last will and testament, executed March 30, 1914, Frances Tasmania Bickerton, among other things, directed: "Item VIII. I give, devise and bequeath to my grand daughter Eleanor Bickerton, daughter of Spencer and Agnes Bickerton, all that parcel or parcels of land situate at Kukuihaele, Island of Hawaii, Territory of Hawaii, known as 'Mooiki' and at present under lease by me to the Pacific Sugar Mill Company, and also, all that certain piece or parcel of land, including the buildings and improvements thereon, the same being my present homestead, situate at number 2459 Nuuanu Valley, in Honolulu, City and County of Honolulu, Territory of Hawaii and being a portion of the Pfotenhauer Estate purchased by me, to have and to hold the same to her, absolutely and forever. And I hereby nominate, constitute and appoint my beloved son Spencer Bickerton guardian of said Eleanor during her minority to serve without bonds."

By a codicil to said will, executed on the 21st day of December, 1916, the testatrix further directed: "I hereby direct that all of my property devised and bequeathed unto my dear grand daughter, Eleanor Bickerton—namely—The Home situated at 2459 Nuuanu Avenue in Honolulu, Territory of Hawaii — also — The Land known as Mooike located in the District of Hamakua, Island of Hawaii, shall not be either sold or mortgaged during the minority of my said grand daughter, Eleanor Bickerton, nevertheless my dear son Spencer Bickerton and his family may enjoy the said home herein mentioned, free of rent, during the minority of my said grand daughter Eleanor Bickerton. I request that the expense for the support, maintenance and education of my dear grand daughter, Eleanor Bickerton, during her minority, be paid out of

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the income of the properties which I have devised and bequeathed unto said Eleanor Bickerton."

The will and codicil were duly admitted to probate after the death of the testatrix which occurred March 3, 1917.

On petition of the plaintiff the defendant, E. White Sutton, was, January 7, 1918, appointed guardian of the infant defendant, Eleanor Cassidy Bickerton, and thereupon duly qualified as such guardian. The infant defendant is of the age of seven years.

After the death of testatrix, and prior to the appointment of defendant Sutton as guardian for the infant defendant, the plaintiff made certain repairs to the property, mentioned in the will and codicil as the "home," and hereinafter called the "home property," by painting, hanging paper, installing a gas heater, a gas range and certain electric lights, costing in the aggregate the sum of \$357.06; and after the appointment of said guardian, plaintiff, acting on his own suggestion and of his own volition, made further repairs and additions to the said home property by way of building an additional bath room and sleeping porch, painting floors, screening servants' quarters, and other similar items, costing in the aggregate the sum of \$616.06. The plaintiff claims reimbursement from the defendants for the expenses incurred by him aforesaid, and which claim the said defendant guardian, for his said ward, disputes.

The plaintiff and his family are on the eve of departure from Honolulu for an indefinite period and plaintiff claims the right to lease the said property and to collect the rents therefor, which claim the guardian disputes. Both parties agree, and which we regard as correct, that the plaintiff has an estate for years in said home property during the minority of the infant defendant. The plaintiff claims that he takes the said property during said term free from the burden of temporary repairs, taxes, special



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assessments and insurance, which claim is disputed by the guardian on behalf of the infant defendant.

We are called upon to settle the existing controversy between the parties, and hold as follows:

(1) Plaintiff and his family have an estate for years in said home property which continues during the minority of the infant devisee, Eleanor Cassidy Bickerton, and have the right to occupy it or lease it and collect the rents therefor. The provision in the codicil whereby testatrix devised the right to plaintiff and his family to enjoy the home free of rent during the minority of the infant defendant, to whom the remainder in fee was devised, created in the plaintiff and his family an estate for years and not a mere personal license to occupy the premises, and plaintiff may lease the estate so created and may collect and retain the rents therefrom.

(2) The repairs and additions made to the home property by the plaintiff were made for the use, benefit and convenience of himself and family, were voluntarily made, and he is not entitled to reimbursement therefor from the estate of his infant daughter notwithstanding that the plaintiff, as father, was, under the statute relating thereto, the natural guardian of the person and property of the infant defendant. The plaintiff takes the home place subject to the burden of keeping the same in such condition as to make it inhabitable, if he so desires to take it, and the care and up-keep of the lawn, the payment of water-rates and like charges must be borne by the plaintiff together with the benefits of enjoyment of the property, as the absence of all provision in the will and codicil as to the up-keep of the property shows that it was the intention of the testatrix that the plaintiff and his family should take the benefit of enjoying the property together with the usual burden of so doing.

(3) Under the statutes relating to the taxation of

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property the interest of plaintiff in the home property is taxable to him and the remainder or interest of the infant defendant is taxable to her guardian and each is liable to pay the taxes so assessed against him respectively.

(4) The question as to paying special assessments is a moot question as it does not appear that any special assessment has been made or will be made and we do not decide that question.

(5) The plaintiff has an insurable interest in the property which he may insure at his own expense or not as he may desire. The infant defendant has an insurable interest, the remainder in fee, which the guardian may insure at the expense of her estate.

A decree in accordance with this decision may be prepared and when approved by the justices will be entered of record in this cause, and it is so ordered.

*W. T. Carden* for plaintiff.

*E. W. Sutton* in proper person.

**Syllabus.**

**SUMNER S. PAXSON *v.* SCHUMAN CARRIAGE COMPANY, LIMITED, A CORPORATION, DEFENDANT; BANK OF HONOLULU, LIMITED, A CORPORATION, BANK OF HAWAII, LIMITED, A CORPORATION, JAMES L. COCKBURN, A. W. T. BOTTOMLEY AND S. M. DAMON, CO-PARTNERS DOING BUSINESS TOGETHER UNDER THE FIRM NAME AND STYLE OF BISHOP & COMPANY, GARNISHEES.**

**No. 1105.**

**EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.  
HON. W. S. EDINGS, JUDGE.**

**SUBMITTED JULY 1, 1918.**

**DECIDED JULY 5, 1918.**

**COKE, C.J., QUARLES, J., AND CIRCUIT JUDGE HEEN  
IN PLACE OF KEMP, J., ABSENT.**

**ABATEMENT AND REVIVAL—*set-off and counterclaim.***

Where the defendant is sued in assumpsit and in his answer pleads by way of set-off and counterclaim a cause of action in assumpsit against the plaintiff, and thereafter, as plaintiff, sues the plaintiff in the prior action as defendant upon the identical cause of action pleaded by way of set-off and counterclaim in the former action, the defendant's plea in abatement in the last action pleading the pendency of the former action and the set-off and the counterclaim therein should be sustained and the last action abated.

**SET-OFF AND COUNTERCLAIM—*control of action.***

Under Sec. 2392 R. L. a set-off and counterclaim is not only a defense by deduction, but is itself an action, and while the plaintiff may control his own action, and discontinue the same, he cannot control, nor discontinue, defendant's cause of action upon the set-off and counterclaim.

**OPINION OF THE COURT BY QUARLES, J.**

**The defendant corporation commenced in the circuit**

## Opinion of the Court.

court of the first circuit an action in assumpsit against the plaintiff, the appellee here, to recover upon an alleged indebtedness. To the complaint in that action the plaintiff here as defendant answered by general denial and by way of set-off plead an indebtedness from the plaintiff in the former suit (defendant here) to him in the sum of \$3000. While said action was pending and undetermined the plaintiff here commenced this action in the circuit court of the first circuit against the defendant (plaintiff in the former action) to recover against the defendant here upon the identical cause of action pleaded by the plaintiff here as a set-off in the former pending action. To the complaint in this action the defendant corporation filed its plea in abatement setting up the pendency of the former action and the set-off therein pleaded upon the identical cause of action set forth in the complaint herein. The former action is still pending and undetermined. The plea in abatement coming on to be heard the circuit court made an order overruling and denying the plea in abatement to which the defendant corporation excepted and at its request the court below allowed an interlocutory exception to this court, which is now before us. The correctness of the order denying the plea in abatement is the only question before us for decision.

Section 2392 R. L. provides: "Judgment in an action in which a claim of set-off has been pleaded shall be rendered in favor of the party to whom a balance is found due for the amount of such balance, not exceeding the jurisdiction of the court or trial justice, with costs. If the amounts found due to the respective parties are equal, judgment shall be rendered in favor of each for such amounts and an entry shall be made that the judgments are satisfied by the set-off, with costs to either party, or without costs to either party, or without costs, as the court orders. If, on the set-off in an action upon a claim

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assigned to the plaintiff before action is brought, a balance is found due to the defendant, or if a balance is found due from any person other than the plaintiff, judgment shall not be rendered against the plaintiff for the balance."

Under this statute when the plaintiff here, as defendant in the former action between the same parties, plead by way of set-off the cause of action herein sued upon it was equivalent to the commencement of a cause of action by him against the plaintiff in the former action (the defendant here). This was not the rule at the common law but is the rule under the statute above quoted. It is generally recognized that a set-off constitutes a cause of action but is a defense by way of deduction only in the absence of statutory provision allowing full relief upon the set-off. Under the statute above quoted the defendant may have a judgment over against the plaintiff for any balance adjudged to be due him when he pleads a set-off against the plaintiff's demand, hence under this statute his set-off is not only a defense by way of deduction in the former action, but is an existing action in which he may recover all of the relief that he could recover in a separate action commenced by him. The plaintiff may not harass and annoy the defendant with more than one action at the same time on the same cause of action as the later action would be regarded in law as vexatious, hence the plea in abatement was good and should have been sustained (*Insurance Co. v. Brune's Assignee*, 6 Otto 588, 592). The set-off was available to plaintiff here in the former pending action where he could have obtained all the relief that he could obtain here. He was in the position of plaintiff so far as his cause of action stated by way of set-off and the plaintiff in that action, while it might discontinue its action against the defendant there (plaintiff here), could not discontinue the action sued on by defendant there by way of set-off. "And it is

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a good plea in abatement that in a prior suit plaintiff in the second suit, defendant in the first, has actually filed or pleaded a set-off or counterclaim for the same cause of action, unless such set-off or counterclaim is unavailable in the prior suit" (1 C. J. p. 74).

The interlocutory exception is sustained and the cause is remanded to the circuit court with instructions to set aside the order overruling the defendant's plea in abatement and to enter judgment sustaining the plea in abatement and dismissing this action.

*E. C. Peters* for plaintiff.

*G. A. Davis* and *C. S. Davis* for defendant.

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ELIZA CABRAL SOUZA AND BELINA CABRAL  
JAGOE *v.* SOCIEDADE LUSITANA BENEFI-  
CENTE DE HAWAII, AN HAWAIIAN COR-  
PORATION.

No. 1086.

SUBMISSION UPON AGREED STATEMENT OF FACTS.

SUBMITTED JULY 1, 1918.

DECIDED JULY 8, 1918.

COKE, C.J., QUARLES, J., AND CIRCUIT JUDGE HEEN  
IN PLACE OF KEMP, J., ABSENT.

ADOPTION—*minors—adults—statute.*

Under a statute providing for the adoption of children, the word "minor" or other words showing an intent to limit adoption to minors not being used, an adult may be adopted by another and the adoption creates in law the relation of parent and child.

Opinion of the Court.

WORDS AND PHRASES—"*children, legitimate or legitimated.*"

The phrase "children, legitimate or legitimated," as used in a by-law of a beneficial society, is broad enough to and does include a child that has been legally adopted under the statute of adoption.

BENEFICIAL ASSOCIATIONS—*by-law—construction.*

Where a by-law of a beneficial association provides that on the death of a member in good standing a certain death benefit shall be paid to his relatives in a certain prescribed order, viz., 1. To the widow; 2. To the children, legitimate or legitimated, the adopted children of a member who dies in good standing leaving no widow are entitled to such death benefit.

OPINION OF THE JUSTICES BY QUARLES, J.

The agreed case shows among other things that Manuel Caetano Baptista, hereinafter called the deceased, married the mother of plaintiffs when the plaintiff Eliza Cabral Souza was seven years of age and the plaintiff Belina Cabral Jagoe (formerly Costa) was an infant in arms. The deceased cared for the plaintiffs as his own children, reared and educated them during their infancy and until their respective marriages, and entertained an affection for them. He was for many years a member of the defendant society and in good standing as such when he died. Having no wife capable of taking the death benefit payable under the by-laws of the defendant society the deceased on April 25, 1917, a short time before his death, filed in the circuit court of the first judicial circuit of the Territory of Hawaii, his petition setting forth the facts and praying that the adoption of the plaintiffs by deceased be authorized, legalized and declared valid. The petition was granted and the decree prayed for was duly made by the judge of the circuit court. The adoption of the plaintiffs legalized by the said decree was accepted by the plaintiffs. At the time the plaintiffs were of the ages of forty-two and thirty-six years respectively. Soon thereafter the deceased died. By the by-laws of the defendant society when a mem-

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ber in good standing dies a death benefit of \$1500 is payable by the defendant society to certain relatives. Article 30 of the by-laws of the defendant society contains the following provisions: "Whenever the member shall not dispose of the death benefit in the manner indicated by the by-laws and the circumstances referred to in Article 24 shall not exist, the board of directors shall pay the death benefit to the relatives in the order following: 1. To the widow. 2. To the children, legitimate or legitimated \* \* \* ." By the agreed facts it appears that the circumstances referred to in Article 24 did not and do not exist and that the deceased died without disposing of the death benefit as authorized by the by-laws of the defendant society. The plaintiffs claim the said death benefit and the defendant society opposes the claim.

On the one hand it is contended that the plaintiffs are either the legitimate or legitimated children of the deceased and as such entitled to the death benefit. On the other hand it is claimed that the provision in Article 30 of the by-laws, "to the children, legitimate or legitimated," does not include an adopted child but applies solely to the offspring of the member either born in lawful wedlock or legitimated after birth by the marriage of the parents; or, if it includes adopted children, the plaintiffs cannot take for the reason that the circuit court or judge had no jurisdiction to legalize the adoption by the deceased of the plaintiffs, the plaintiffs being adults at the time of the decree legalizing their adoption.

The argument that the by-law in question contemplates only blood relatives we do not regard as entirely correct as the first person named, the widow, is not related by consanguinity.

The adoption of children was unknown to the common law and is a creature of statute. The statutes of adoption of various jurisdictions are so different that adjudicated



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cases to be of assistance must be under statutes similar to our own. The purpose and effect of such statutes are, however, the same everywhere, that is, to create the relation of parent and child where it did not otherwise exist. *In re Estate of Moran*, 151 Mo. 555, the court at page 557 said: "The intention of the statute is to enable a person to bestow upon the object of his favor the attribute that the law bestows on one's own offspring and to establish as nearly as possible the relation of parent and child. The word child in relation to the word parent, gives no suggestion as to age, and that is the sense in which it is used in the statute." If the adoption of plaintiffs by deceased was valid the relation of parent and child was created between the deceased and each of the plaintiffs and plaintiffs are children of the deceased within the meaning of the by-law in question. There is nothing in the by-laws of the defendant society under discussion which shows the intention of the defendant society to exclude from participation in the death benefit, where no widow survives, an adopted child. The phrase "children, legitimate or legitimated" is broad enough to and does include the adopted child which, after adoption in either of the modes provided by our statute, sustains to the adopting parent the relation of a legitimate child and as such is capable of inheriting from the adopting parent (R. L. Sec. 2994).

But is the decree validating and legalizing the adoption by the deceased of the plaintiffs void for the reason that the plaintiffs were adults at the time the decree was made? By section 2272 R. L. circuit judges are granted power at chambers, among other things, "to legalize the adoption of children." By section 2994 R. L. a child may be adopted by decree or judgment of a judge or court of record or by agreement of adoption duly acknowledged and recorded, and the adopted child thereafter sustains the relation of child and heir to the adopting parent (*Leialoha v. Wolters*,

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21 Haw. 304). There is nothing in our statute confining the same to minors. Under a similar statute the supreme court of Massachusetts has held that a decree adopting children of the ages of forty-three, thirty-nine and twenty-five, respectively, is valid (*Collamore v. Learned*, 171 Mass. 99). *In re Estate of Moran, supra*, the court also said: "The law has placed no limitation as to the age of the child to be adopted, and there is no reason why such a restriction should be placed on the choice of the adopting parent." This argument probably points to the true reason why the legislature failed to confine the proceedings of adoption to minors. Similar rulings are found in *Markover v. Krauss*, 132 Ind. 294; *Sheffield v. Franklin*, 44 So. (Ala.) 373, 12 L. R. A. N. S. 884, while in *Moore, Petitioner*, 14 R. I. 38, and in *Williams v. Knight*, 18 R. I. 333, a different rule was announced.

The relation of parent and child may by adoption exist between adults under the statute which does not confine the adoption to minors, hence the plaintiffs are children of the deceased within the meaning of Article 30 of the by-laws of the defendant society and are entitled to a judgment for the death benefit in the sum of \$1500.

A judgment may be prepared and entered accordingly and it is so ordered.

W. J. Robinson for plaintiffs.

Andrews & Pittman for defendant.

Syllabus.

KATE L. BARNES *v.* HENRY K. DE FRIES AND  
EMMA A. DE FRIES.

No. 1101.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.  
HON. S. B. KEMP, JUDGE.

SUBMITTED JULY 8, 1918.

DECIDED JULY 15, 1918.

COKE, C. J., QUARLES, J., AND CIRCUIT JUDGE HEEN  
IN PLACE OF KEMP, J., DISQUALIFIED.

PRINCIPAL AND AGENT.

Where R, under authority of a general power of attorney, executed a lease of a lot of land owned by B, his principal, the lease being in the individual name of R and the lessee not having knowledge that R was not the owner of the property or that he was acting for a person other than himself: Held, that the lease was binding upon B, the principal.

SAME.

The contract of the agent is the contract of the principal and he may sue or be sued thereon though not named therein.

OPINION OF THE COURT BY COKE, C. J.

This is an action of ejectment instituted by the plaintiff Kate L. Barnes in the circuit court of the first circuit against the defendants Henry K. De Fries and Emma A. De Fries, who are husband and wife. The cause was tried in the court below, jury waived, the decision and judgment being in favor of the defendants. The facts are simple, and briefly stated are as follows: The plaintiff is the owner of certain premises situated on Nuuanu street in the city of Honolulu, containing an area of about 11,685 square feet; that on the first day of December, 1915, and for many years prior thereto this property was under the management and control of W. E. Rowell acting under a

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written power of attorney executed by the plaintiff and dated August 5, 1903, which conferred authority upon Rowell to deal generally with all property owned by plaintiff within the Territory of Hawaii; that on September 1, 1915, the power of attorney still being in force and effect, Rowell, in his own name, executed a written lease to the defendant Emma A. De Fries for the term of five years at a specified rental; that all rents reserved were paid by the defendant Emma A. De Fries up to the time of the institution of the suit. There is nothing in the record to indicate that the defendant Emma A. De Fries had any knowledge at the time the lease was executed that Rowell was not the owner of the property or that he was acting for a person other than himself. Plaintiff was disclosed as Rowell's principal and the actual owner of the property when she instituted this action. The plaintiff contends that because the lease in question was not signed by the plaintiff either in her individual capacity, or by her through her attorney in fact, the same was therefore not binding upon her and that she is entitled to recover possession of the property involved.

After the trial of the cause the court below held that the authority conferred by the power of attorney was sufficiently broad to authorize the leasing of the land by the attorney in fact and that while the lease was executed in the name of Rowell it was in fact the act of the plaintiff through her duly authorized agent or attorney in fact and that she was bound thereby.

We concur in the decision of the court below holding that plaintiff is bound by the act of her agent although he may have acted in his own name when leasing the property belonging to his principal. "The contract of the agent is the contract of the principal and he may sue or be sued thereon though not named therein; and notwithstanding the rule of law that an agreement reduced to

## Opinion of the Court.

writing may not be contradicted or varied by parol it is well settled that the principal may show that the agent who made the contract in his own name was acting for him. This proof does not contradict the writing, it only explains the transaction." *Ford v. Williams*, 62 U. S. 287. There can be no doubt that the plaintiff in this case might, after disclosing herself as the principal, have maintained an action against the defendant Mrs. De Fries for the payment of any rent in arrears or for the breach of any covenants contained in the lease. "We may assume it to be quite clear and well supported by authority that in the case of oral contracts the principal may sue in his own name upon a contract made with his agent. It is equally well settled that the same rule applies to cases of sales by written bills or other memoranda made by the agent, using his own name and disclosing no principal." *Eastern R. R. Co. v. Benedict*, 66 Am. Dec. 384. "It has been decided that a principal may be charged upon a written simple executory contract entered into by an agent in his own name within his authority, although the name of the principal does not appear in the instrument, and was not disclosed, and the person dealing with the agent supposed that he was acting for himself, and that this rule obtains as well in respect to contracts which are required to be in writing as to those where a writing is not essential to their validity." 31 Cyc. 1115, 1116. See also *Edwards v. Golding & Peabody*, 20 Vt. 30.

The defendant Mrs. De Fries was rightfully in possession of the property in question under a valid lease binding upon plaintiff at the time the suit was instituted and plaintiff cannot maintain her action.

Finding no error in the record the exceptions are overruled.

*W. J. Robinson* for plaintiff.

*R. W. Breckons* and *H. L. Grace* for defendants.

## Opinion of the Court.

UNITED CHINESE SOCIETY, BY CHU GEM, GOO KIM FOOK, HO FON, TONG KAU, CHONG PAK SUN, PANG LUM MOW, WONG HOW, YEE MUN WAI AND M. C. AMANA, ITS TRUSTEES, AND CHU GEM, GOO KIM FOOK, HO FON, TONG KAU, CHONG PAK SUN, PANG LUM MOW, WONG HOW, YEE MUN WAI AND M. C. AMANA *v.* YEE YAP, LAU TONG, YONG KWONG TAT, LEE CHUCK, LAM YAT KEUNG, LEE LAU, WONG SAI KUEN, C. F. ZEN AND CHIN CHAU.

No. 1079.

## PETITION FOR REHEARING.

FILED JULY 9, 1918.

DECIDED JULY 19, 1918.

COKE, C.J., QUARLES, J., AND CIRCUIT JUDGE EDINGS  
IN PLACE OF KEMP, J., DISQUALIFIED.

*Per Curiam:* The petitioners, appellees, have filed herein a petition for a rehearing. While denying the petition for a rehearing we deem it advisable, in order that there may be no doubt or misunderstanding respecting the import of the language used in the opinion rendered herein by this court, to modify or vary the paragraph beginning with the word "We" at the beginning of line 16 from the top of the last page of said opinion and ending with the word "conducted" at the end of line 27 from the top of said last page of the opinion on file herein (lines 17 to 30 inclusive, 24 Haw. 381) so that said paragraph will read as follows, to wit:

"We therefore hold that the decree of the judge of the court below should be modified so as to provide for the

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appointment by the judge of a commissioner clothed with power and authority to prepare a roll or list of the members of the society, such roll or list to contain only the names of the *bona fide* members, and said commissioner being authorized to issue certificates of membership to members not possessing the same and after the completion of the roll or list of membership the commissioner, after due notice, to call an election of the members of the society to fill said vacancy in the board of trustees which occurred in the year 1913, and, as hereinabove held, could only be filled by the members of the society for the reason that said vacancy was not caused by the death or disability of a trustee, said commissioner to have the general direction and supervision of such election to the end that the same may be properly and fairly conducted." And it is so ordered.

W. B. Lymer for the petition.

## Syllabus.

KULUWAIMAKA OKAMURA *v.* MELE KAULANI,  
W. YIM SAM, YEE KAI YOU, TONG KAU, TRUS-  
TEE FOR TONG CONEY, A MINOR, AND TONG  
CONEY, A MINOR.

No. 1082.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.  
HON. T. B. STUART, JUDGE.

ARGUED JUNE 12, 1918.

DECIDED JULY 31, 1918.

COKE, C.J., QUARLES, J., AND CIRCUIT JUDGE ASHFORD  
IN PLACE OF KEMP, J., ABSENT.

TRIAL—*res adjudicata*.

Where upon appeal to this court it was held that K. A. K., the grantee named in a certain deed, was K. Jr. and not K. Sr., and upon a trial *de novo* no evidence being introduced contrary to the above facts so found the identity of K. A. K. as K. Jr. became *res adjudicata*.

OPINION OF THE COURT BY COKE, C. J.  
(CIRCUIT JUDGE ASHFORD DISSENTING.)

This cause comes here on exceptions from the court below. In that court plaintiff had instituted an action to quiet title to certain lands situated at Kahehuna, now known as Fort street extension, Honolulu. The cause was tried by the court, jury waived, and a decision was thereafter rendered in favor of the defendant and judgment was entered in accordance therewith. The property now claimed by plaintiff is an undivided one-half interest in lot A containing 23,200 square feet, and lot B1 containing 890 square feet, being a part of the property described in the complaint. The case was before us on a former occasion (*Okamura v. Kaulani*, 22 Haw. 414) where a his-



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tory of the case and the facts appertaining thereto may be found. In that proceeding the lower court gave judgment in favor of the defendant. This judgment was reversed and the cause remanded to the court below for retrial. In its opinion this court used the following language: "The trial court did not find, as it should have done, the time at which the changes in the original draft of the deed from Mailou were made, but held that the burden was on the plaintiff to show that such changes were made prior to the execution of the deed. \* \* \* If the interlineations were made before execution, there is no alteration of the deed made by the grantor, and the title of the property described in the Mailou deed was conveyed to plaintiff's ancestor," and the chief justice in his concurring opinion said: "If the initials 'K. A.' were interlined before execution the title passed by the deed not to Kapiioho senior but to Kapiioho the son."

Upon a trial *de novo* of the cause the court below rendered a decision expressly finding "that the interlineations were made at the time that the deed was executed and before the delivery," the court further saying that "the color of the ink used in the interlineations and used in writing the name of Dimond as a witness and Mailou as grantor is different from the body of the deed. I believe that the interlineations are in the handwriting of Dimond and were made at his suggestion." And thus the trial court found the facts relative to the interlineations in the deed favorably to plaintiff. The trial court, however, held that K. A. Kapiioho, named in the deed from Mailou, was in fact Kapiioho Sr., and not Kapiioho Jr., the deceased husband of plaintiff. This finding was unsupported by any evidence introduced at the last trial of the cause. The evidence shows that the deceased husband of plaintiff, and from whom she claims title to the property as an heir, was known as K. A. Kapiioho, also as Kaiakoili Kapiioho,

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also as Ioseve Kaiakoili, and also as Joe Ili. It is also established by the evidence that Kapiioho Sr. was sometimes called Lono Hanele Kapiioho, sometimes L. H. Kapiioho, also Mr. Kapiioho, and at least upon one occasion I. Kapiioho, but at no time did he ever go by the name of K. A. Kapiioho.

The judge of the circuit court having found that the interlineations in the deed of the initials "K. A." before the name Kapiioho were in fact made at the time of the execution of the deed and prior to the delivery thereof, reduced the case entirely to a question of fact as to the identity of K. A. Kapiioho, the grantee named in the deed, and this court having found upon the evidence adduced at the first trial that K. A. Kapiioho was the son and not the father and no evidence having been introduced at the second trial warranting a contrary finding the question became *res adjudicata*. It is not denied that at least one of the given names of Kapiioho Jr. was Kaiakoili. The plaintiff argues that this name is a corruption of the word Kaiakoalii, which, properly divided, should be Ka Iako Alii, meaning the outrigger of the canoe of an alii or chief, and that the initials of this name might properly be "K.A." But be that as it may there is undisputed evidence in the record that Kapiioho Jr. was known as K. A. Kapiioho and was so recognized by his father, Kapiioho Sr., at least upon one occasion.

The absence of contrary evidence or of evidence that Kapiioho Sr. was ever known as K. A. Kapiioho or that either of the initials was ever used by him compels us to hold that the K. A. Kapiioho, designated in the deed from Mailou, was the husband of the plaintiff herein and that the decision of the court below holding to the contrary was wholly unsupported by any evidence, and that upon the evidence and the former opinion of this court the judgment should have been for plaintiff.

Circuit Judge Ashford, dissenting.

The plaintiff assigns as error numerous alleged arbitrary and prejudicial rulings of the trial judge which we find unnecessary to discuss in view of the foregoing opinion disposing of the cause favorably to plaintiff upon other grounds.

The exceptions are sustained, the decision and judgment of the lower court reversed and the cause remanded to the circuit court for further proceedings consistent with this opinion.

*C. F. Peterson* for plaintiff.

*A. Lindsay, Jr.*, for defendants.

DISSENTING OPINION OF CIRCUIT JUDGE ASHFORD.

Being unable to agree with the majority opinion herein, I will express the reasons for my dissent with such brevity as I shall be able.

Primarily, we should keep in view the principle that in a suit to quiet title to land, as in an action of ejectment, the plaintiff must recover, if at all, upon the strength of her own title, and not upon the weakness of that of her opponents. And because, in my opinion, plaintiff has not shown title in herself, she was rightfully decided against by the trial court herein.

I adopt, as constituting the crux of the case presented for our decision, the language which I here quote from the majority opinion:

"The judge of the circuit court having found that the interlineations in the deed of the initials 'K. A.' before the name Kapiioho were in fact made at the time of the execution of the deed and prior to the delivery thereof, reduced the case entirely to a question of fact as to the identity of K. A. Kapiioho, the grantee named in the deed."

But I strongly dissent from the conclusion which immediately follows, viz:

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“—and this court having found (22 Haw. 414) upon the evidence adduced at the first trial that K. A. Kapiioho was the son and not the father and no evidence having been introduced at the second trial warranting a contrary finding, the question became *res adjudicata*.”

In my judgment, the language last quoted represents error, both of law and of fact. In the first place it strikes me as being unwarranted in law to hold that the quality or the fact of any point becoming or being *res adjudicata* can, by any logical possibility, depend upon the state of the evidence in a *later* trial. Secondly, the question of the identity of K. A. Kapiioho was not presented to this court by any of the exceptions passed upon in the former appeal (22 Haw. 414), in such manner as to permit this court, upon the consideration of those exceptions, to decide as to the identity of K. A. Kapiioho—certainly not to the extent of depriving the circuit court, upon a re-trial, of the right to inquire and determine such identity. A new trial (*venire de novo*), having been granted upon the former hearing in this court, it then became competent for, and the duty of the circuit court, upon such second trial, to determine *all questions of fact and of law* that were involved in the case. And, that the question of the identity of K. A. Kapiioho was one of such questions of fact involved (at least to the extent of determining whether that name represented the son of the elder Kapiioho, who later married plaintiff, and through whom she claims), appears to me too plain and obvious to call for argument. A concession of this point carries with it a refutation of the position, stated in the majority opinion, that the question of the identity of this individual became thus (as I may express it), retroactively *res adjudicata* through the failure (if there was a failure—which I do not concede), to prove upon the second trial that the son of the elder Kapiioho was not the K. A. Kapiioho referred to in the

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deed under discussion. And, to now hold that the question of fact embracing the identity of the son as K. A. Kapiioho is *res adjudicata* by virtue of the former decision of this court, is the equivalent of holding that the circuit court, upon the second trial, was not at liberty to inquire into or to determine the question of such identity. The bare statement of this proposition is sufficient to refute it.

So much for the error of law alleged by me in respect of the latest of the foregoing quotations from the majority opinion. The error of fact which I charge against it lies in the holding that there was no evidence introduced on the second trial which warranted a finding that the son was *not* K. A. Kapiioho.

An attentive reading and comparison of the testimony given on the second trial has convinced me not only that nothing therein could justify a holding that the son in question was at any time during his life known to any of his family or acquaintances as K. A. Kapiioho—but it affirmatively appears from said evidence that he was never so known—and that he did not know, and would not have recognized himself as being the person described as K. A. Kapiioho.

The only witness who attempts to show such identity is the plaintiff—formerly the wife of the son, and even she testifies that he was married to her in 1889—almost eleven years after the execution of the deed in question—under the name of Joseve Kaiakoili, and that his “English name” was Joseph Ili; that up to the time of the execution of the deed in question, the old man had not given those initials to his son, but that, at the time of making the deed, the old man gave those initials to his son, and so the deed was made out that way (Transcript, pp. 59-60); that neither the son nor she (then his wife), knew or suspected that the son had any property on Oahu until about twelve years after the execution of the deed, when the

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father sent, for execution by the son and his wife, a form of quit-claim deed to the parcel of land involved, for reasons which sufficiently appear in the record and in opinions of members of this court upon the former hearing. Much more to this general effect might be cited from the transcript of evidence upon the second trial, and the evidence of Mr. Lindsay, one of the counsel engaged, and a former judge of said circuit court—should be mentioned, wherein he testifies that during six years following the marriage of the son in question to this plaintiff, the son was subordinate employe to the witness in the plantation store at Naalehu, Kau—where the son was born, lived all his life, and died, and that during those six years, although in almost hourly contact and conversation with the son in his own language—Hawaiian—Mr. Lindsay knew him only by the names of Kaiakoili, and (more intimately) as Joe Ili.

In the face of the record herein I regard it as impossible to find that the son in question was ever known or described, or intended to be described as K. A. Kapiioho. In my judgment, the evidence adduced upon the second trial would not justify a finding that the son was ever known by, or ever adopted the family or surname of Kapiioho. It is true that our statute provides that “all children born in wedlock shall have their father’s name as a family name. They shall, besides, have a Christian name suitable to their sex.” (R. L. Sec. 3069.) In accordance with this provision it would have been quite appropriate for the son to have been known as Kapiioho, together with such Christian name as might have been bestowed upon him. In his case, the Christian name of Kaiakoili was so bestowed. But I respectfully insist that the family name of Kapiioho was never recognized as belonging to the son. Nor was there anything peculiar or singular in this, for every native or kamaaina resident of Hawaii well knows

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the usage prevalent among Hawaiians whereby the name of the father is completely ignored by the sons, and, where there are several such sons, it is by no means unusual for them to adopt separate surnames. Such examples will occur to the memory of every kamaaina. The late King Kalakaua was the son of Kapaakea, but, so far from having adopted his father's name, he was known all through his life as David Kalakaua; and his younger brother was known as William Pitt Leleiohoku. The family of our present Delegate in Congress affords another prominent example. Although, according to our statutory rule, our Delegate and his brothers should have been known by the family name of Piikoi, yet, it is universally known that they not only did not adopt such family name, but that each of them adopted a different surname, whereby the three sons became known respectively as David Kawananakoa, Edward A. Keliiahonui, and Jonah Kuhio Kalani-anaole.

An effort was made to fit the initials K. A. to the son's name of Kaiakoili—a name little used by him—on the theory that this name is a combination of three Hawaiian words—*Ka iako alii*—which mean the outrigger of a chief's canoe. But reflection upon a few familiar Hawaiian names which, like Kaiakoili, contain the letters K and A, will demonstrate the absurdity of this attempt. The familiar name of Kealoha—applied indiscriminately to males and females, may be taken as an example. An experience of nearly thirty-six years among Hawaiians, has never brought to my attention an instance of a person named—for example—Kealoha, adopting the K and one of the A's—or any other combination of letters made up from such name, as a plural set of initials. Further than this, the instant case is the first example of such an attempt that has come to my knowledge in Hawaii, and it does not impress me—except with its novel absurdity.

## Syllabus.

To epitomize, therefore, I respectfully and with all deference to the majority of the court, contend:

1. That the award of a new trial of the issues herein (22 Haw. 414), threw open every question of law and fact involved in this action.

2. That the identity of K. A. Kapiioho, the grantee in the deed in question, was one of the facts involved.

3. That in order that plaintiff should prevail, it was essential that she should establish the identity of her former (and now deceased) husband as the K. A. Kapiioho to whom the deed runs.

4. That the evidence amply justified the holding of the trial court, that plaintiff had failed to prove such identity.

Wherefore, in my opinion, the judgment of the trial court was correct (upon whatever combination of reasons it is based), and the exceptions should be dismissed.

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IN THE MATTER OF THE ESTATE OF JOHN ENA,  
DECEASED.

No. 1112.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

HON. C. W. ASHFORD, JUDGE.

ARGUED JULY 23, 1918.

DECIDED JULY 31, 1918.

COKE, C.J., QUARLES, J., AND CIRCUIT JUDGE EDINGS  
IN PLACE OF KEMP, J., ABSENT.

TRUSTS—*compensation of trustees.*

Trustees are to be allowed the same fees which are allowed by statute to executors, administrators and guardians.



## Opinion of the Court.

*SAME—same—extra compensation allowed for professional or special services.*

Where the trustee has rendered services to the estate which are professional in character and are outside of the duties usually required of it extra compensation should be allowed.

*SAME—same—same.*

Where the trustee of an estate who is a stock broker and who as such sells stocks and bonds of the trust estate in order to liquidate the outstanding indebtedness of the estate and the sale is approved by the court the trustee is entitled to reasonable compensation for the services rendered in addition to the statutory compensation prescribed for routine services.

*SAME—same—same.*

Each claim for special or professional services rendered by a trustee to the trust estate must stand upon its own merits. It must appear that the services were for the sole benefit of the estate and the claim for compensation must be reasonable.

## OPINION OF THE COURT BY COKE, C. J.

The appellants, Father H. Valentin and the Hawaiian Trust Company, Limited, are the trustees under the will of John Ena, deceased. During the year 1917 it became necessary in order to liquidate certain outstanding indebtedness of the estate to sell certain stocks and bonds owned by it. This sale was made by the Hawaiian Trust Company, one of the trustees, which is a member of the Honolulu Stock and Bond Exchange and as such is regularly engaged in the business of a stock broker. The usual commissions prescribed by the stock exchange were charged by the Hawaiian Trust Company for the sale of the stocks and bonds sold for the Ena estate. The total amount realized from the sale amounted to about \$3000 and the commission thereon charged by the trust company was \$12.87. An account of the sale was contained in the sixth annual report rendered by the trustees to the court. This report was approved by the court with the exception of the item of \$12.87 so charged by the trust

## Opinion of the Court.

company as brokerage fees as aforesaid, which amount was disallowed and ordered to be surcharged against the trustees. The trustees thereupon appealed to this court.

The appeal presents the one question, that is to say, whether a trustee may properly charge the usual brokerage fees in addition to his regular commission when, acting as a broker, he sells corporation stock or bonds belonging to the trust estate, and where, as in this case, the sale is approved by the court and no claim is made that the sale was not necessary and proper nor that the amount of the brokerage fees was unreasonable.

It appears from the record in this cause that by the rules of the Honolulu Stock and Bond Exchange members are required to charge certain fixed commissions on sales and purchases of corporation stocks and bonds and that the penalty for a breach of such rules is suspension from the exchange. The court below held that the statutory commission allowed to the trustees constituted the sole compensation to which they are entitled. It is to be noted that in the statute of this Territory prescribing a schedule of fees to be allowed persons acting in a fiduciary capacity trustees are not mentioned. (See Sec. 2542 R. L.) The rule has, however, been established, first by custom and then by decisions of the courts of the Territory to the effect that trustees are to be allowed the same fees which are by statute allowed to executors, administrators and guardians. "We have no statute that prescribes the compensation of trustees, but we believe it has been the practice here, and as a rule, elsewhere, under similar circumstances, to follow in such cases the statutes which prescribe the fees of executors, administrators and guardians." *In re Estate of Lunalilo*, 13 Haw. 317, 318. But where, in a case like the present one, the trustee has rendered services to the estate which are professional in character and are outside of and in addition to the duties usually

## Opinion of the Court.

required of it may it not properly have compensation for the special services rendered? The services performed were not in the line of its duty as a trustee and were not imposed upon it by the will nor by law. The English chancery rule was that a fiduciary office was to be considered honorary and gratuitous and a trustee was entitled to no compensation either for the performance of his usual duties or for professional services of any character rendered to the trust estate. The harshness of this rule was soon recognized in America and at an early date most of the States, either by statute or by decision of the courts, gradually modified the rule so that at the present date compensation for both routine and professional or special services is to be allowed. A half century ago the courts of Hawaii departed from the orthodox English rule and enunciated a more liberal policy in dealing with this subject. "The probate court will allow charges for legal services when such are necessary, and will allow them to the administrator himself, if he is a lawyer, in such cases as they would be allowed to an administrator employing a lawyer, but every case must be determined by its own circumstances." *In the matter of the Estate of Hiram Maikai*, 3 Haw. 522. See also *In the matter of the Guardianship of Rebecca Panee Humeku*, 15 Haw. 394. If then it is proper to allow additional compensation as attorney's fees to the administrator who as an attorney renders special services to the estate, how can it be improper to allow reasonable brokerage fees to a trustee who as broker properly sells stocks and bonds belonging to the trust estate? "In many States a commission on the amounts received and paid out is allowed; an excellent basis for such computation, and, perhaps, universally approved in this country, where a fiduciary's recompense is passed upon. But as such a rule meets the routine rather than extraordinary services our later cases appear inclined to

## Opinion of the Court.

allow to an executor or administrator besides the usual commission a moderate charge for professional and personal services specially rendered by him where such skill was needed and bestowed and where he was capable of bestowing it." Schouler on Wills, Sec. 1545. "It cannot be doubted that for services of an extraordinary character rendered by a trustee he is entitled to extra compensation beyond the usual allowance for receiving and disbursing trust funds. If professional services necessary to the proper administration of the trust have been rendered by a trustee in person he is clearly entitled to such reasonable compensation as he would have paid had he been obliged to employ counsel." *Perkins' Appeal*, 108 Pa. 314, 318, 319. See also 39 Cyc. 494. Each individual claim for compensation for special or professional services rendered by a trustee to the trust estate must stand upon its own merits. It must appear that the services were for the sole benefit of the estate and the claim for compensation must be reasonable. There must be no ground for just suspicion that the fiduciary in rendering the services was actuated by motives of personal gain rather than of a proper regard for the interests of the estate. The present case, however, meets these requirements. The sale of the stock and bonds was approved by the court, which carried with it an approval of the services rendered by the trustee, and there is no claim that the commission charged was unreasonable and we can see no reason for disallowing it.

The order appealed from is reversed and the cause remanded to the court below with instructions to allow the compensation for the sale of the stock and bonds claimed by the trustee.

*R. B. Anderson* (*Frear, Prosser, Anderson & Marx* on the brief) for the trustees.

Opinion of the Court.

MARY KANIU JARRETT v. HEINRICH M. VON HOLT, AS EXECUTOR AND TRUSTEE UNDER THE WILL OF CECIL BROWN, DECEASED, AND IRENE K. DICKSON.

No. 1088.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.  
HON. C. W. ASHFORD, JUDGE.

ARGUED JULY 26, 1918.

DECIDED JULY 31, 1918.

COKE, C.J., QUARLES, J., AND CIRCUIT JUDGE EDINGS  
IN PLACE OF KEMP, J., ABSENT.

OPINION OF THE COURT BY COKE, C. J.

Cecil Brown, late of Honolulu, deceased, by his last will and testament bequeathed to plaintiff, Mary Kaniu Jarrett, \$100 per month and to Irene K. Dickson \$150 per month during their respective natural lives. The residue of the estate was left to defendant Heinrich M. von Holt. The estate is shown to be of the approximate value of \$240,000. After the will had been offered for probate by von Holt an agreement was entered into between him and Irene K. Dickson by the terms of which she was to receive the sum of \$300 per month from the estate, and certain assets of the estate were set aside to be held by von Holt, and the income thereof to be applied to the payment of the \$300 per month reserved to her under the agreement. The plaintiff instituted a suit in equity wherein she complains that the agreement between von Holt and Miss Dickson was in derogation of her rights and seeks to annul the agreement and to enjoin von Holt from in any way dissipating the corpus of the estate, and prays for further relief unnecessary to be stated here.

## Opinion of the Court.

At the trial of the cause plaintiff introduced in evidence the agreement between von Holt and Miss Dickson and called Mr. von Holt who testified that the securities mentioned in the agreement between himself and Miss Dickson were in his hands as executor of the will of Cecil Brown and that said securities were standing in the name of Cecil Brown.

In dismissing plaintiff's bill of complaint at the close of the case the trial court in its oral decision expressed the opinion that von Holt had a legal right to enter into a private agreement with Miss Dickson to pay her \$300 a month or any other sum so long as in so doing he did not jeopardize the rights of the plaintiff. Counsel for plaintiff then requested a decree to the effect that any agreement von Holt had made with Miss Dickson would be subject to the prior claim of plaintiff against the estate. The court dismissed the bill refusing to enter the decree requested by plaintiff and she comes to this court by appeal.

The record in this case does not show any injury or even threatened injury to plaintiff. Her rights do not appear to be in jeopardy. Beyond doubt the legacy of \$100 per month which is reserved to plaintiff by the terms of the will of Cecil Brown constitutes a claim against all the assets of the estate which is prior to any rights enjoyed by von Holt or which he might create by agreement and this is conceded by counsel for both von Holt and Miss Dickson. It does not seem that a decree of court could make this more emphatic. But if a decree of the court below would have afforded plaintiff any additional security to the rights acquired by her under the will of Cecil Brown the same ends will be fully subserved by this opinion.

The decree appealed from is affirmed.

Syllabus.

*L. Andrews* (*Andrews & Pittman* on the brief) for plaintiff.

*R. B. Anderson* (*Frear, Prosser, Anderson & Marx* on the brief) for defendant H. M. von Holt.

*C. H. Olson* (*Robertson & Olson* on the brief) for defendant Irene K. Dickson.

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ANTONE FERNANDEZ, JR., *v.* SOCIEDADE LUSITANA BENEFICENTE DE HAWAII, AN HAWAIIAN CORPORATION.

No. 1045.

ERROR TO CIRCUIT COURT, SECOND CIRCUIT.

HON. W. S. EDINGS, JUDGE.

ARGUED JULY 10, 1918.

DECIDED AUGUST 1, 1918.

COKE, C.J., QUARLES, J., AND CIRCUIT JUDGE HEEN  
IN PLACE OF KEMP, J., ABSENT.

APPEAL AND ERROR—*instructed verdict—failure of allegation and proof.*

A judgment on writ of error is affirmed where the jury were instructed to find for the defendant, an examination of the record shows that a fact material to plaintiff's recovery was not alleged or proven, and nothing in the record shows that the error was cured.

OPINION OF THE COURT BY QUARLES, J.

The plaintiff in error, hereinafter called the plaintiff, while a member of the defendant in error, a beneficial society, hereinafter called the defendant, was injured in February, 1915, in an automobile accident, the tendons of his left hand being cut so that he has not since been

## Opinion of the Court.

able to use it having lost the power to grip or hold anything with it. He was treated at the Paia hospital by Dr. McConkey, who, while having the case under treatment, called in for consultation Dr. Rothrock. In May, 1917, fourteen months after the injury, the plaintiff presented a claim to the defendant for invalid benefits under the by-laws of the defendant, which claim was disallowed by the defendant, after which this action was commenced in assumpsit to recover the sum of \$345 invalid benefits claimed to be due plaintiff from the defendant. The cause was tried to the court and jury and at the close of the case plaintiff moved for an instructed verdict in the sum of \$287.50, which motion was denied. The defendant moved for an instructed verdict, which motion was granted. The plaintiff excepted to the ruling of the court in both instances. The cause is before us upon writ of error.

Two errors are relied on: (1) The denial of plaintiff's motion for an instructed verdict; (2) the granting of the motion of the defendant for an instructed verdict in its favor.

At the trial plaintiff testified that he made his claim for benefits and the defendant designated two doctors—Straub and Kilbourne—to examine the plaintiff, and that he was examined by them in the presence of the president of the defendant; that Dr. Straub said he could do nothing for plaintiff without an operation, whereupon plaintiff asked him if he, Dr. Straub, would guarantee the operation and the doctor said he would not; that Dr. Kilbourne said he could not do anything for the hand at all. Dr. Rothrock testified that the injury might be partially remedied by an operation but that this was doubtful. During the trial a notice from the defendant to the plaintiff was introduced, reading as follows:



Opinion of the Court.

"July 8th, 1916.

"Mr. Antonio Fernandez, Jr.

"Paia, Maui.

"Sir:

"By order of the Board of Directors of the Sociedade Lusitana, you are hereby informed that in accordance with the opinion of the doctors that examined you, in Honolulu, recently, you cannot be considered an invalid.

"Both the physicians who examined you, are of the opinion that an operation would be beneficial to you and in all probability would restore the necessary movements to the thumb.

"Yours, etc.,

"Clerk of the Society."

The statements of plaintiff as to what Drs. Straub and Kilbourne said in the presence of defendant's president as to the injury were not contradicted by any one. The evidence clearly shows without contradiction that the plaintiff cannot use his left hand, cannot button his collar or tie his shoes and cannot follow his usual vocation of running a moving-picture machine, and that while this condition may be partially removed by a surgical operation there is no certainty as to the result of such an operation, which would be experimental. Upon receipt of said notice plaintiff wrote to the arbitration board of the defendant and was notified by it that the board stood by the decision of the directors in refusing to allow plaintiff's claim. We quote the following articles from the by-laws of the defendant:

"Article 1. There shall be an arbitration board composed of nine members appointed by the President of the Society and whose duties are to take cognizance of all complaints preferred against any member or officer as well as appeals from the decisions of the Board of Directors, deciding the justice of such complaints or appeals. It is also its duty to consider and decide all matters that

## Opinion of the Court.

may be submitted to it by the Board of Directors or the Auditing Board. Its decisions are final in all cases."

"Article 14. Members who through old age or infirmity or a disease reputably incurable, finds himself such a state that he cannot earn his subsistence, attested by one or more doctors indicated by the directors, shall be considered invalids."

"Article 15. The invalid member shall be granted a monthly pension of \$12.50 if he should be of the adult class and \$6.25 if of the juvenile class."

The ground upon which the instruction for a verdict in favor of defendant was asked and granted is that defendant having provided for an arbitration board whose decision on appeal should be final plaintiff is precluded from resorting to a court of law for redress. Whenever a question of property is at stake, as is the case here, it is generally held, although there is authority to the contrary, that the decision of an arbitration board created by a beneficial society with power to finally determine controversies is not final and the party complaining may sue in a court of law. A study of the decisions shows that this rule is usually applied where by fraud or wrong a member of such a society is deprived of a property right by the society. The defendant here cannot arbitrarily refuse to pay a claim where the facts and the reports of its designated doctors show claimant entitled thereto, as such refusal would be a fraud upon the claimant and one which cannot be sanctioned. The inference is a reasonable one from the evidence that Drs. Straub and Kilbourne reported that plaintiff had lost the use of his left hand—that it was invalid—and that such loss might be restored by an operation. During the trial plaintiff called upon the defendant to produce the reports of these doctors and the defendant refused to do so without showing any inability on its part to do so. While the ground upon

## Opinion of the Court.

which the jury were instructed to find for the defendant, presented by the defendant and evidently considered by the court, was erroneous, the instruction and verdict in favor of defendant were correct upon another view. Under the by-laws of the society a member who through old age or infirmity or a disease reputably incurable cannot earn his subsistence is entitled to the monthly benefit. It was necessary for plaintiff to allege in his complaint that by reason of infirmity or disease he is in such a state that he cannot earn his subsistence and that this fact had been attested by one or more doctors indicated by the directors of the defendant in order for his complaint to state a cause of action. There is no such allegation in the complaint, and while the absence of this allegation might have been cured by defendant's offering proof upon that fact yet the record shows that the defendant did offer to prove by cross-examination of plaintiff that plaintiff was earning his subsistence, the plaintiff objected to such evidence and the court sustained the objection. There was therefore absence of allegation and proof of a fact material to plaintiff's recovery.

The judgment is affirmed.

*E. Murphy* for plaintiff in error.

*H. Edmondson* (*E. C. Peters* on the brief) for defendant in error.

## Opinion of the Court.

SUMNER S. PAXSON *v.* SCHUMAN CARRIAGE COMPANY, LIMITED, A CORPORATION, DEFENDANT; BANK OF HONOLULU, LIMITED, A CORPORATION, BANK OF HAWAII, LIMITED, A CORPORATION, JAMES L. COCKBURN, A. W. T. BOTTOMLEY AND S. M. DAMON, CO-PARTNERS DOING BUSINESS TOGETHER UNDER THE FIRM NAME AND STYLE OF BISHOP & COMPANY, GARNISHEES.

No. 1105.

## TAXATION OF COSTS.

SUBMITTED JULY 31, 1918.

DECIDED AUGUST 9, 1918.

COKE, C.J., QUARLES, J., AND CIRCUIT JUDGE HEEN  
IN PLACE OF KEMP, J., ABSENT.

*Per Curiam:* The defendant, the Schuman Carriage Company, Limited, came to this court on exceptions which were sustained and it has now filed in this court its bill of costs. The plaintiff objects to the item of \$18.50 for cash paid to B. N. Kahalepuna, clerk of the circuit court of the first circuit, for preparation of the record on exceptions. Plaintiff does not question that this sum was paid to the clerk of the circuit court by defendant but urges that a large portion of the record prepared by the clerk was unnecessary and that plaintiff should not be charged with the cost of the preparation thereof. Upon a careful examination of the record we find that the record prepared by the clerk of the circuit court, for which he charged \$18.50, is composed of about forty-four pages and that approximately one-half of this record was entirely unnecessary for a proper consideration of the cause by

## Opinion of the Court.

this court on exceptions. Petition for process of attachment, bond on attachment, garnishee summons, return on attachment and summons, and numerous other unnecessary records of the court below were included in the record prepared and sent up to this court.

We have on several occasions called attention to an increasing laxity in the preparation of records on appeal. Both as a matter of economy and for the convenience of the appellate court the record brought up should not contain duplications nor other unnecessary records, and where unnecessary documents are included in the record the appellant, should he prevail in this court, will not be permitted to recover from the appellee costs for the preparation of that portion of the record which is found to be unnecessarily made a part thereof. See *Tyler v. Wise*, 21 Haw. 166; *Scott v. Kona Development Co.*, 21 Haw. 462; *Halawa Plantation v. County of Hawaii*, 22 Haw. 753, 757.

The item of \$18.50 to which plaintiff, appellee, has objected is allowed in the sum of \$9.25. In other respects the cost bill will be taxed as presented.

*E. C. Peters* for plaintiff.

*G. A. Davis* for defendant.

## Syllabus.

W. H. A. SHERMAN *v.* JAMES McCLELLAN, ET AL.

No. 1121.

RESERVED QUESTIONS FROM CIRCUIT JUDGE, FIRST CIRCUIT.  
HON. C. W. ASHFORD, JUDGE.

FILED AUGUST 2, 1918.

COKE, C.J., QUARLES, J., AND CIRCUIT JUDGE HEEN  
IN PLACE OF KEMP, J., ABSENT.*Appeal and Error—record—reserved questions.*

This court will return unanswered for decision by the circuit judge in the first instance reserved questions based upon a lengthy original record in the circuit court and this court will answer no reserved questions except upon a record made for and to remain in this court.

*Same—reserved questions—returned unanswered.*

Where the plaintiff sues forty-seven defendants, a number of appearances being made by various counsel for some of the defendants, one of the defendants answering the bill of complaint which was for accounting, discovery and enforcement of stockholders' liability in a corporation, numerous demurrers being filed upon behalf of the other defendants wherein numerous grounds of demurrer are alleged, each of the demurrers being different from the other and whereby a large number of questions are raised, the circuit judge at the hearing of the demurrers and before the argument was completed reserved the questions as to whether or not the demurrers should be sustained, and if not all of them, which of the demurrers should be sustained and which should be overruled, such reserved questions do not present concrete questions of law contemplated by the statute and this court will return the same unanswered.

*Per Curiam:* The plaintiff filed his bill of complaint for accounting, discovery and the enforcement of liability as stockholders of the defendant James McClellan and forty-six others in the circuit court of the first judicial circuit. To the bill of complaint one defendant answered,

## Opinion of the Court.

appearing by his attorney C. C. Bitting, and denied the allegations of plaintiff's bill. One of the defendants appeared by his attorney E. R. Bevins alleging three grounds for demurrer. Twenty-three defendants appeared by their attorneys Thompson & Cathcart and filed their joint demurrer alleging sixteen grounds of demurrer. Two other defendants appeared by their attorneys Thompson & Cathcart and filed their several demurrers alleging sixteen grounds of demurrer. Another defendant appeared by his attorney R. W. Breckons and filed a demurrer to plaintiff's bill alleging five different grounds of demurrer. Four defendants appeared by their counsel E. C. Peters and filed a demurrer to the complaint alleging in said demurrer eighteen grounds. A large number of questions were raised by these various demurrers.

It appears that at the hearing at chambers of the demurrers and before the argument was completed the circuit judge concluded that this was a proper case for reservation to this court, and the circuit judge, in certifying the questions to this court, said: "That, after the argument upon said demurrers had proceeded for a time, and was still unfinished, the said first judge, conceiving this to be a proper and appropriate case for reservation and certification to your honorable supreme court for a decision as to whether said demurrers, or any of them, should be sustained, and being in doubt as to what decision should be rendered by him, the said first judge of said circuit court, in respect of said demurrers,—and, by the consent of counsel for said complainant and said demurrants respectively, then and there entered an order reserving said question, to wit, whether said demurrers, or any of them, should be sustained,—to the said supreme court, for decision by said last mentioned court."

The questions reserved are as follows:

## Opinion of the Court.

“(1) Should said demurrers, or any thereof, be sustained?”

“(2) If certain of said demurrers should be sustained, and certain other or others thereof should be overruled,—which of said demurrers should be sustained, and which should be overruled?”

The original record in the circuit court containing the bill of complaint, the various demurrers filed by the different defendants and stipulations of the parties as to time for appearing and demurring is transmitted to this court with the certified questions, and no transcript of the pleadings and demurrers, so as to make a record for preservation in this court, is sent to this court. Under such circumstances this court will decline to answer reserved questions and will return reserved questions certified in such manner for decision by the circuit judge or court in the first instance. The statute authorizing the reservation of questions by a circuit judge or circuit court, either with or without motion of parties, was intended to afford the opportunity of having concrete questions of law, apparently decisive of some phase of the case, decided in advance by this court. The statute does not contemplate that the burden of deciding the merits of a long and complicated bill of complaint, to which numerous demurrers by different defendants presenting different questions, the questions aggregating many in number, should be imposed upon this court for decision in the first instance, and the statute vests in this court the discretion of returning any or all reserved questions unanswered. And this court, under the circumstances of this case, both on account of the record and on account of the form and substance of the questions reserved, returns the same to the circuit judge for decision in the first instance.



Syllabus.

ALBERT WATERHOUSE, TRUSTEE, v. W. C. ACHI,  
C. G. MACOMBER AND KAUKANI MACOMBER,  
WIFE OF C. G. MACOMBER, MICHAEL KAU-  
NERT, HENRY VAN GIESON AND FONG WONG  
SHEE.

No. 1106.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

HON. C. W. ASHFORD, JUDGE.

ARGUED JULY 15, 1918.

DECIDED AUGUST 22, 1918.

COKE, C. J., QUARLES, J., AND CIRCUIT JUDGE EDINGS  
IN PLACE OF KEMP, J., ABSENT.

PARTIES—*equity—mortgages—application of payments.*

Where a mortgage contains a stipulation that the mortgagor may sell the mortgaged property in parcels, the mortgagee to receive and apply on the mortgage indebtedness certain portions of the proceeds of the sales and a second mortgage is given on the same property in which it is stipulated that the mortgagor may sell in parcels and all of the proceeds of sales not applicable to the prior mortgage indebtedness, shall be paid upon the subsequent mortgage indebtedness, the mortgagee in the prior mortgage is a necessary party to a suit to foreclose the latter mortgage, especially when it is alleged in the answer of the mortgagor that sales had been made the proceeds of which over and above the amounts applicable to the senior mortgage indebtedness were sufficient to satisfy the junior mortgage indebtedness and that the junior mortgagee had, without the consent of the mortgagor, permitted the senior mortgagee to retain all of the proceeds of such sales, as under such circumstances the mortgagees in both mortgages are legally and beneficially interested in the subject matter of the suit, and the mortgagor has the right to have the application of the payments determined.

OPINION OF THE COURT BY QUARLES, J.

(CIRCUIT JUDGE EDINGS DISSENTING.)

The appellee, hereinafter called the plaintiff, commenced

## Opinion of the Court.

this suit in equity to foreclose a mortgage executed by the defendant Achi upon twenty-two lots in the Lunalilo tract in Honolulu. In his amended bill the plaintiff alleges a loan by himself, as trustee for himself and E. Kopke, made to defendant Achi September 1, 1914, in the sum of \$5000 to secure payment of which a note due September 1, 1917, and the said mortgage were given. This mortgage was subject to a prior mortgage executed by the defendant Achi to the trustees under the will of W. C. Lunalilo. In his amended bill the plaintiff alleges that he has received upon the mortgage indebtedness the sum of \$650 paid February 17, 1915, the sum of \$600 paid July 1, 1915, the sum of \$300 paid December 20, 1916, and the sum of \$100 on account of interest on the principal sum paid February 28, 1915. The plaintiff alleges that he has purchased the interest of E. Kopke in the said mortgage and indebtedness secured thereby. In the mortgage to plaintiff, which is made a part of the amended bill and wherein the senior mortgage is referred to, we find the following stipulation: "It is also agreed that as often as the mortgagor shall make sale or sales of any of the lots affected by this mortgage, if he shall then, after first paying to the mortgagees in said prior mortgage of February 5, 1913, the amount or amounts required to be paid them thereunder in cases of sales, pay the remaining proceeds of sale to the mortgagee herein to be credited on the indebtedness hereunder, the mortgagee will execute partial release of this mortgage as to the property sold, but at the sole cost of the mortgagor."

The defendant Achi filed a demurrer to plaintiff's amended bill on the ground of the nonjoinder of the trustees of the Lunalilo estate claiming that such trustees are necessary parties to the suit. The record before us shows that the plaintiff joined in this demurrer but does not show what disposition was made of the demurrer.

## Opinion of the Court.

The defendant Achi filed his answer to the plaintiff's amended bill, in which other defendants joined, admitting the execution of the note and mortgage, as alleged in plaintiff's amended bill, and alleging that the plaintiff has no right to foreclose the mortgage for the reason that the plaintiff surrendered to the trustees under the Lunalilo will his share of the money from lots sold by the defendant Achi and that the plaintiff did so without the consent of defendant Achi; that the trustees under the will of said Lunalilo were only entitled to take 28 to 37 cents a foot for lots sold; that the mortgage indebtedness to the Lunalilo estate was more than \$17,000 at the time the mortgage was made to plaintiff and that it had been reduced to less than \$3,000; that defendant Achi does not know that the plaintiff has bought out the interest of E. Kopke in the note and mortgage but leaves that for plaintiff to prove; that since the commencement of this suit the defendant Achi has sold two lots to certain parties and that each of these parties paid to the trustees of the Lunalilo estate for the use of themselves and the plaintiff the sum of \$165, making a total of \$330, which said trustees hold for themselves and the plaintiff. Said answer further alleges: "And the defendant W. C. Achi further says that if the plaintiff herein had not surrendered his share of the money in the lots sold since the making of the mortgage, this mortgage would long have been paid in full before the filing of this amended petition." There is no replication to the answer in the record before us. The answer shows, although it is crudely drawn and is full of uncertainty, that of the purchase price of such of the mortgaged lots as should be sold a certain portion, ranging from 28 cents to 37 cents per foot, was to be paid to the first mortgagors and the remainder to plaintiff on the mortgage sought to be foreclosed and that a sufficiency had been received by the first mortgagors over and above what they

## Opinion of the Court.

were to retain to have satisfied the plaintiff's mortgage in full, and that plaintiff, without the consent of said defendant Achi, agreed that said first mortgagees should retain the same. The plaintiff moved for a decree, which motion was granted, and the defendants appeal.

The only error that has been argued by respective counsel is the failure of the circuit judge to order the trustees under the will of W. C. Lunalilo to be made parties defendant and brought into this suit on the ground that they are interested in the subject-matter of the suit and their presence is necessary to an equitable adjustment of the subject-matter of this suit. This is the position of the appearing defendants but is combatted by plaintiff on the ground that a mortgagee in a senior mortgage is not interested in a junior mortgage and is not a necessary party to a suit to foreclose the latter. Many authorities are cited to this effect but they are in cases where the mortgages did not contain stipulations whereby the mortgagor may sell the mortgaged property in parcels and the mortgagees shall receive the proceeds of the sales, apportioned among them according to stipulations in the mortgages, as is the case at bar. If both mortgages did not contain stipulations as to the sale in parcels of the mortgaged property by the mortgagors and the application of the proceeds of the sale or sales to the respective mortgage indebtedness we would have to determine whether the rule which obtains in some jurisdictions to the effect that a junior mortgage may be foreclosed without making the mortgagee in a prior mortgage of the same property a party to the suit, but under the circumstances of this case it is not necessary to determine this question. Where a mortgage contains a stipulation that the mortgagor may sell the mortgaged property in parcels, the mortgagee to receive and apply on the mortgage indebtedness certain

## Opinion of the Court.

portions of the proceeds of the sales and a second mortgage is given on the same property in which it is stipulated that the mortgagor may sell and all of the proceeds of the sales not applicable to the prior mortgage indebtedness shall be paid upon the subsequent mortgage indebtedness, the mortgagee in the prior mortgage is a necessary party to a suit to foreclose the latter mortgage, especially when it is alleged in the answer of the mortgagor that sales had been made the proceeds of which over and above the amount applicable to the senior mortgage indebtedness were sufficient to satisfy the junior mortgage indebtedness and that the junior mortgagee had, without the consent of the mortgagor, permitted the senior mortgagee to retain all of the proceeds of such sales as under such circumstances the mortgagees in both mortgages are legally and beneficially interested in the subject-matter of the suit. It is well settled in this jurisdiction that all parties interested in the subject-matter of a suit in equity are necessary parties to the suit (*Kaopua v. Keelikolani*, 6 Haw. 123; *McKeague v. Neisser*, 6 Haw. 461; *Magoon v. Afong*, 10 Haw. 340).

There being a common fund—the proceeds of the sales of lots by the mortgagor—applicable to the satisfaction of the indebtedness secured by both mortgages the mortgagor has a right to have the fund apportioned according to the stipulations contained in the respective mortgages and in order to do so the mortgagees in the senior mortgage are necessary parties and should be before the court.

The decree is reversed and the cause is remanded to the circuit judge with instructions to make an order requiring the plaintiff to amend his amended bill and make the trustees under the will of W. C. Lunalilo parties to the suit and for further proceedings consistent with the views herein expressed.

## Syllabus.

*W. W. Thayer* for plaintiff.

*W. C. Achi* (*Achi & Achi* on the brief) for defendants.

EDINGS, CIRCUIT JUDGE: I respectfully dissent from the decision of the court in the above entitled case.

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KAHOI KEALOHA *v.* HALAWA PLANTATION,  
LIMITED, AND HENRY H. PERRY.

No. 1117.

MOTION TO DISMISS.

ARGUED AUGUST 9, 1918.

DECIDED AUGUST 29, 1918.

COKE, C.J., QUARLES, J., AND CIRCUIT JUDGE HEEN  
IN PLACE OF KEMP, J., ABSENT.

**ACTION—*damages—trespass—judgment.***

An action sounding in damages against joint trespassers is in its nature a joint and several action. The plaintiff may proceed against the defendants jointly or separately for the entire damage but can have but one satisfaction of judgment.

**SAME—*same—same—same.***

Where plaintiff elects to maintain his action against the defendants jointly any judgment recovered against them is joint and several.

**APPEAL AND ERROR—*notice of appeal—service on adverse party.***

The general rule respecting appeals is that co-parties to an action who do not join in the appeal must be served with notice of appeal when their interests are adverse to those of the party prosecuting the appeal.

**SAME—*same—same.***

A party to a cause is adverse to the appellant and must be served with notice of appeal, whose interest would be detrimentally affected if any of the relief sought by the appeal should be granted.

Opinion of the Court.

EXCEPTIONS, BILL OF—*service on adverse party.*

The same rules governing service of notice of appeal on adverse party also apply to bills of exception.

OPINION OF THE COURT BY COKE, C. J.

The plaintiff Kahoi Kealoha instituted an action for damages in the circuit court of the third judicial circuit against the defendants Halawa Plantation, Limited, and Henry H. Perry jointly for alleged trespass. The defendants answered separately by separate counsel and at the trial of the cause, jury being waived, defendants separately defended. The trial being concluded judgment was rendered against the defendants and in favor of plaintiff for the sum of \$3788 together with costs. The defendants separately filed written exceptions to the decision and judgment. The defendant Halawa Plantation, Limited, comes to this court on a bill of exceptions. The defendant Perry did not join his co-defendant in the bill of exceptions, nor has he been served with a copy thereof, or otherwise received notice of this proceeding. The plaintiff has interposed a motion to dismiss the bill of exceptions brought to this court by the defendant Halawa Plantation, Limited, on the ground "that the defendant Henry H. Perry is not a party thereto, either as appellant or appellee and that the appellant the Halawa Plantation, Limited, is not entitled as a matter of law or right to have its said bill of exceptions considered by this court." This motion presents a question fraught with no little difficulty and we have given to it careful and mature consideration not only for its importance to the parties hereto but for the additional reason that it calls for the determination of a matter entirely new in this jurisdiction as well as for the adoption of a rule of procedure of concern to the bar as well as to litigants in the Territory. The plaintiff invokes in support of his motion the rule laid down in

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*Simpson v. Greeley*, 20 Wall. 152, and adopted by this court in *Territory v. Ah Sing*, 18 Haw. 392, and again in *Robinson v. Kaae*, 22 Haw. 397, that is to say "that all the parties against whom a joint judgment or decree is rendered must join in the writ of error or appeal or it will be dismissed except sufficient cause for the non-joinder be shown." A great many authorities are to be found approving this rule. But there is a dearth of authority upon the subject where a bill of exceptions is involved. This probably is due to the fact that in very few of the American states or elsewhere is a review by bill of exceptions recognized as a method of appeal. Such a proceeding was unknown to the common law and appears to have had its origin in the statutes of Westminster II (13 Edw. 1 c. 31) and from there found ingraftment into the early laws of the State of Massachusetts, the laws of which State governing appellate procedure whether by writ of error, statutory appeal or bill of exceptions are in close harmony with our own. In a few of the states a bill of exceptions is required as a basis for a review by error. There is a fundamental distinction between an appeal by a bill of exceptions and an appeal by a writ of error even where both are permitted by statutory law. See *Meheula v. Pioneer Mill Co.*, 17 Haw. 91. A writ of error is in the nature of a new proceeding commenced by petition and upon which a citation issues. A bill of exceptions possesses neither of these features. We think there is closer analogy between statutory appeals and review by bills of exceptions, and that the rules of the former should ordinarily govern the latter where not contrary to established rules of procedure.

An action sounding in damages against joint trespassers is in its nature a joint and several action. In the present case the plaintiff might have proceeded against either one of the defendants or against them both sep-



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arately or as he did in this case against them jointly for the entire damage sustained but of course he could have but one satisfaction of judgment. Where as in this case the plaintiff is maintaining his action against the defendants jointly the judgment recovered by him is joint and several, and this is conceded by counsel for appellant. Freeman on Judgments, 3d ed., Sec. 236; *Dyer v. Tyrrell*, 127 S. W. 114; *Brooks v. Ashburn*, 9 Ga. 297; *Livingston v. Bishop*, 3 Am. Dec. 330; *Wright v. Lathrop*, 15 Am. Dec. 529. Any execution that might be issued on the judgment could have satisfaction out of the joint property of defendants if any they possessed or out of the separate property of either of said defendants or partial satisfaction out of the property of one and partial satisfaction out of the property of the other.

The general rule respecting appeals is that co-parties to an action who do not join in the appeal must be served with notice of appeal when their interests are adverse to those of the party prosecuting the appeal. 2nd Ency. Pl. & Pr. 192; 2 R. C. L. pp. 109, 110, 111; *Wilson v. Kiesel*, 164 U. S. 248; *Owings v. Kincannon*, 32 U. S. 397. "Every party whose interest in the subject-matter of the appeal is adverse to or will be affected by a reversal or modification of the judgment or order appealed from is an adverse party \* \* \* and as it affirmatively appears that numerous parties to the action each of whom would be affected by a reversal or modification of the order appealed from neither joined in the appeal nor was served with notice thereof respondents' motion to dismiss must be sustained." *Crouch v. Dakota W. & M. R. R. Co.*, 117 N. W. 145.

It has been said that every party to an action who would not be left in *statu quo*, if everything asked for by the appellant on his appeal is granted, is an adverse party and must be served with notice of appeal. We take this to mean that a party to a cause is adverse to the

## Opinion of the Court.

appellant and must be served with notice of appeal, whose interest would be detrimentally affected if any of the relief sought by the appeal should be granted.

If the defendant Perry would be adversely affected by the sustaining of any of the exceptions brought up to this court by his co-defendant it was necessary that he have notice of the proceedings which the Halawa Plantation, Limited, is seeking to prosecute in this court. Assuming that this court should sustain one or more of the exceptions brought up by the Halawa Plantation, Limited, and a new trial would result therefrom, the judgment now standing against both of the defendants jointly and severally in the court below would remain in force as to Perry. Would this not affect his status? Take a step further and assume that upon the re-trial of the cause the Halawa Plantation, Limited, should prevail, the entire burden of the judgment now subsisting against both defendants would be thrown upon the shoulders of Perry. Hayne on New Trial and Appeal, Sec. 281; *Frawley v. Hoverter*, 36 Minn. 379; *Lake v. Tebbitts*, 56 Cal. 481; *Minturn v. Baylis*, 33 Cal. 129; *Prescott v. Haughey*, 51 N. E. 1051. But inquires counsel for the Halawa Plantation, by what method could it bring in its co-defendant Perry? Counsel makes the point that unlike a proceeding upon a writ of error the law furnishes no machinery by which service of a bill of exceptions can be had upon a refractory co-defendant. Applied to the present case the answer is obvious. If the defendant Perry as a matter of law is to be considered an adverse party that is to say would his interest be compromised in any manner by the review by bill of exceptions now being prosecuted by the Halawa Plantation, Limited, he should have had the same notice required to be given to the plaintiff appellee. In our jurisdiction this requirement and the method of service is not prescribed by statute but is regulated by

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rules of court which have the force of law. Rule 6 of the circuit court of the third judicial circuit provides that "copies of all pleadings and papers filed subsequent to the initial pleading, shall be served by the party filing the same on the *opposite party* or his attorney. \* \* \* Such service and receipt of copies should be acknowledged in writing on the original, signed by the party served, or shall be shown by certificate signed by the party serving them." And Rule 28 thereof provides that "upon the filing and presenting to the judge and due service of a copy of a bill of exceptions *opposite* counsel shall have five days in which to file exceptions thereto."

We think the phrases "adverse party" and "opposite party" are synonymous terms when employed in the rules of appellate procedure. If as we have pointed out Perry was an adverse party he was also an opposite party and therefore came within the scope of the rules quoted exactly in the same manner and to the same extent that the plaintiff came within the scope thereof.

Under these rules the Halawa Plantation, Limited, was required to and did serve a copy of its bill of exceptions upon the plaintiff and it was equally essential that it make service upon the defendant Perry. The personal liability of Perry having been determined by a court of competent jurisdiction this court has no authority to change the judgment so as to alter his liability or status in any way detrimental to him without notice. If we were to assume jurisdiction and pass upon the exceptions presented we would in fact be disposing of matters affecting a party not before us and who has been afforded no opportunity to be heard. Counsel for defendant Halawa Plantation, Limited, suggests that if this court holds that the bill of exceptions should have been served upon Perry permission now be granted to make the service. The most favorable authority coming to our attention in

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support of this request is *Hutts v. Martin*, 131 Ind. 1, where it is said that "where appellant's failure to give notice of appeal to his co-party is due to *accident* or *mistake* the appeal will not be dismissed but an opportunity will be given to the appellant to correct his error." But, even could this liberal rule appertaining to a notice of appeal be properly adopted as applying to a bill of exceptions yet in this case no showing is made that failure to serve Perry with the bill of exceptions was due either to accident or mistake, nor is any other excuse for the failure to make service upon him offered. And furthermore if Perry was an adverse party at the time of the presentation of the bill of exceptions to the judge of the court below he had a right to have the bill of exceptions served upon him and the further right to appear within five days before the judge and file exceptions to the bill of exceptions. How could this last mentioned right be now exercised when the bill of exceptions has long since been settled and passed out of the hands of the judge of the circuit court.

The motion to dismiss the bill of exceptions is granted. We grant the motion with the less regret as there is still ample time for the Halawa Plantation, Limited, to obtain in another proceeding any relief to which it may be entitled, by reason of the matters contained in its bill of exceptions.

A. Lindsay, Jr., for the motion.

A. G. M. Robertson, contra.

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IN THE MATTER OF THE ESTATE OF CECIL  
BROWN, DECEASED.

No. 1107.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.  
HON. C. W. ASHFORD, JUDGE.

ARGUED JULY 26, 1918.

DECIDED AUGUST 30, 1918.

COKE, C.J., QUARLES, J., AND CIRCUIT JUDGE EDINGS  
IN PLACE OF KEMP, J., ABSENT.

*WILLS—residuary legatee—annuity—charge.*

Where a will devises to respondent all of testator's estate except two small legacies and directs that respondent pay to petitioner one hundred dollars monthly during her lifetime and makes the same a charge upon the estate, the transfer is to respondent who takes subject to the charge which is a lien on the estate.

*TAXATION—inheritance tax—transfer.*

The inheritance tax under the statute is upon the transfer of property in contemplation of death, so that when property is devised to one with a charge that he pay another a monthly sum, the inheritance tax is chargeable against the devisee and not to the annuitant.

OPINION OF THE COURT BY QUARLES, J.

The will of the late Cecil Brown devised one tract of land to his daughter Mary K. Brown, and bequeathed to Mabel S. Campbell his silverware, following which is the residuary clause, to wit:

“All the rest, residue and remainder of my estate, real personal or mixed, and wheresoever situate, I give, devise and bequeath unto my said nephew, Heinrich Martens von Holt, and to his heirs; the only charge on it being that if at any time after my death the estate is in funds and can pay the sum of Two Hundred and Fifty Dollars a month so long as my stepdaughter Irene K.

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Dickson is living, and my reputed daughter Mary K. Brown is living, that One Hundred and Fifty Dollars of said sum of Two Hundred and Fifty Dollars be paid said Irene K. Dickson each month for and during the term of her natural life, and to my reputed daughter Mary K. Brown during the term of her natural life the remainder, being the sum of One Hundred Dollars."

The respondent von Holt, as executor, and who is the residuary legatee, obtained from the Registrar of Public Accounts a valuation of the annuity of the petitioner (formerly Mary K. Brown) based upon mortality tables, the valuation being designated at \$18,078.11, upon which it is claimed that an inheritance tax of \$903.90 is payable to the Territory. The respondent claiming that such inheritance tax is payable by the petitioner out of the annuity payable to her, withheld the amount thereof as security for payment of the tax out of the annuity. The petitioner filed her petition asking that respondent be ordered to pay to her the full amount of the annuity payable to her without deduction, and upon hearing before the circuit judge sitting at chambers in probate the prayer of the petition was granted, and respondent has appealed from said order to this court. The question before us is as to the correctness of the order appealed from, which raises the question as to whether the inheritance tax is payable by the executor or residuary legatee upon the whole estate devised him, or whether the valuation of the annuity as made should be deducted from the corpus of the estate and the inheritance tax thereon charged to the petitioner. If chargeable to petitioner, the respondent had a right under the statute to withhold it, as he did, and if not chargeable to the petitioner the order appealed from should be affirmed.

It should be borne in mind that the residuary clause transferred the estate, with the exception of the two small

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legacies mentioned, to the respondent, and by express provision makes the payment to the petitioner of the sum of one hundred dollars monthly a charge upon the estate so transferred to the respondent. Under our tax statutes, inheritance taxes are upon transfers in contemplation of death, and not upon the property transferred (*Brown v. Treasurer*, 20 Haw. 41; *Robinson v. Treasurer*, 22 Haw. 742, 748). The transfer of the property out of which the monthly payments to the petitioner are to be made is to the respondent, and not to the petitioner. A charge of this kind only creates a lien and does not transfer the estate or create an interest therein, the title to which passes to the devisee, and not to the party to whom the charge is payable. The will devolves upon respondent the duty of paying to petitioner the monthly payment of one hundred dollars, and it is apparent from the language used by the testator that he intended that such payments should be made without deduction for any cause whatever. Should petitioner die the payments would stop. Suppose she should die within one or two years the difference between the monthly payments made to her and the said valuation of \$18,078.11 would remain in the hands of respondent to whom all of the residuary estate of testator passed under the will. The position of petitioner is analogous to that of a creditor where the will devises the estate to one with the charge that he shall pay the debt. Nothing would be transferred to the creditor by the will, yet it would create a lien upon the estate in his favor for the payment of his debt, and he would not be chargeable with the inheritance tax. No title or interest was transferred to the petitioner by the will; she was given a lien thereon for certain monthly payments of indeterminate value, notwithstanding the probable value thereof as shown by mortality tables. See *Potter v. Gardner*, 12 Wheat. 498; *Rohn v. Odenwelder*, 162 Pa. St. 346; 4 Kent's Com. 540. In

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*Thayer v. Finnegan*, 134 Mass. 62, the testatrix appointed her eldest son executor and gave him all her property, he to pay her debts and the expenses of schooling her younger son. The court held that such debts and expenses of schooling were charges upon the estate transferred to the eldest son. Nothing was transferred to either the creditors or younger son, but the payments of their debts in the one instance, and expenses of schooling the younger son in the other, were charges that created liens upon the estate. That case is analogous to the case at bar. The inheritance tax is payable upon the transfer of the residuary estate to respondent and not out of the monthly payments to be made to the petitioner. Many authorities have been cited to sustain the contention of respondent, but authorities, unless it appears that the cases decided were under similar statutory and testamentary provisions, are of no assistance here.

The order appealed from is affirmed.

*L. Andrews* (*Andrews & Pittman* on the brief) for the petitioner.

*R. B. Anderson* (*Frear, Prosser, Anderson & Marx* on the brief) for the respondent-executor.



Syllabus.

FEODOR BOBKOFF *v.* PETER CHESTICOFF.

No. 1097.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.  
HON. W. S. EDINGS, JUDGE.

SUBMITTED JULY 19, 1918.

DECIDED SEPTEMBER 6, 1918.

COKE, C.J., QUARLES, J., AND CIRCUIT JUDGE ASHFORD  
IN PLACE OF KEMP, J., ABSENT.

JUDGMENT—*default.*

The determination or sentence by a court debarring the defendant from the right to answer is in the eyes of the law a judgment and is so recognized by section 2363 R. L.

STATUTES—*mandatory.*

Mandatory statutes are imperative; they must be strictly pursued; otherwise the proceeding which is taken ostensibly by virtue thereof will be void.

OPINION OF THE COURT BY COKE, C. J.

The plaintiff, appellee, commenced an action for damages against the defendant, appellant, in the court below in January, 1918, based upon alleged slanderous words spoken of and concerning plaintiff by defendant. The defendant, although duly served with process, failed to make answer to the complaint within the time prescribed by law and on March 14, 1918, judgment of default was entered against him. On April 16, 1918, the defendant being absent, a jury was drawn and upon the *ex parte* evidence of plaintiff a verdict was rendered against the defendant for the sum of \$2000. On the following day the defendant filed a motion, supported by affidavits, to open the default and to vacate and set aside the verdict. Counter affidavits were filed by the plaintiff. The motion was denied by the trial court and on April 23, 1918, a judgment

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for the amount of the verdict, together with costs, was entered against defendant and in favor of plaintiff. It appears that a few minutes prior to the entry of the final judgment on April 23, 1918, the plaintiff filed with the court an affidavit showing that the defendant was not in the military service of the United States government. On April 26 the defendant presented to the court a motion to vacate the judgment, said motion being based upon the entire record in the case, including the affidavits presented by defendant with the first motion. This motion was denied and the defendant comes to this court on a bill of exceptions.

The bill of exceptions embraces in its compass but two questions for our consideration. It is first urged by defendant that the court below was without jurisdiction to enter the judgment of default for the reason that the plaintiff had not first filed an affidavit showing that the defendant was not in the military service of the United States government as required by an act of Congress which took effect March 8, 1918, and which act is commonly known as the "Soldiers and Sailors Civil Relief Bill;" and, second, that the refusal of the trial court to open the default and set aside the judgment constituted an abuse of its discretionary power.

The first paragraph of Article II of the Soldiers and Sailors Civil Relief Bill provides "That in any action or proceeding commenced in any court if there shall be a default of any appearance by the defendant the plaintiff before entering judgment shall file in the court an affidavit setting forth facts showing that the defendant is not in military service. If unable to file such affidavit plaintiff shall in lieu thereof file an affidavit setting forth either that the defendant is in the military service or that plaintiff is not able to determine whether or not defendant is in such service. *If an affidavit is not filed showing that*

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*the defendant is not in the military service, no judgment shall be entered without first securing an order of court directing such entry, and no such order shall be made if the defendant is in such service until after the court shall have appointed an attorney to represent defendant and protect his interest and the court shall on application make such appointment.*" This is a remedial statute and its nature and purpose requires a strict compliance with its provisions. The foregoing paragraph of the law deals with the subject of default and clearly refers to judgments of default. Plain mandatory language is employed in the act. If a defendant is in default the court must pause and require an affidavit showing that the defendant is not in the military service of the United States government and if no such affidavit is forthcoming the court must then make an order directing that judgment be entered, one or the other being an indispensable prerequisite to the entry of judgment. If the affidavit is not filed the order must precede the judgment, but the order cannot be made until the court appoints an attorney to represent defendant and protect his interest if he is in military service.

In the case at bar no affidavit was filed prior to the entry of the judgment of default showing that the defendant was not in the military service of the United States government nor did the court, prior to the entry of the judgment, make an order directing that the same be entered. The plaintiff contends that it is the main judgment rendered on the merits of plaintiff's claim, and not the judgment of default, which is referred to in the statute, and that plaintiff having filed the affidavit prior to the entry of final judgment the requirements of the statute were complied with. A determination or sentence by a court debarring the defendant from the right to answer is in the eyes of the law a judgment and is as fully entitled

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to that appellation as is the final judgment, and is so recognized by section 2363 R. L. See also 23 Cyc. 734. Indeed it would be an idle proceeding to appoint an attorney to defend a party after he was debarred from the right to plead as well as the right to introduce evidence which would be the defendant's status after entry of the judgment of default. R. L. Secs. 2363-64. The affidavit of plaintiff, having been filed subsequent to the judgment of default, came too late to constitute a compliance with the statute.

Counsel for plaintiff urge that the judgment is not void, but voidable only; that the defendant not having shown that he was in the military service could not seek the protection of the statute, which was intended only to safeguard the rights of those in the military service. But the statute does not require the defendant to make any showing whatsoever whether he be in the military service or not. The entire burden of making the showing or securing the order of court is cast upon the plaintiff. It is true that the purpose of the statute is to extend protection to those in the military service, but in order that such persons may be amply protected others are affected. The statute lays down certain prescribed rules of procedure which must be strictly pursued in all cases. It is immaterial whether the defendant has as a matter of fact been prejudiced by the failure of the plaintiff to file the required affidavit or in lieu thereof to secure an order of the court directing entry of the judgment. The statute is mandatory and all the steps prescribed by it must be strictly complied with. "Mandatory statutes are imperative; they must be strictly pursued; otherwise the proceeding which is taken ostensibly by virtue thereof will be void. Compliance therewith, substantially, is a condition precedent; that is, the validity of acts done under a mandatory statute depends on a compliance with its require-

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ments. \* \* \* Where legislation points out specifically how an act is to be done, although without it the court or officials under their general powers would have been able to perform the act, yet as the legislature imposed a special limitation it must be strictly pursued." Sutherland, *Statutory Construction*, Sec. 454. See also 36 Cyc. 1157; *Brisbane v. Peabody*, 3 How. Pr. 109. Counsel for plaintiff in support of their contention that only those actually in military service may invoke the protection of the statute quote paragraph 4 of Article II, which recites "that if any judgment shall be rendered in any action or proceeding governed by this section against any person in military service during the period of such service or within thirty days thereafter, and it appears that such person was prejudiced by reason of his military service in making his defense thereto, such judgment may, upon application made by such person or his legal representative not later than ninety days after the termination of such service, be opened by the court rendering the same, and such defendant or his legal representative let in to defend" etc. This provision has to do with a judgment rendered after compliance with the prior provisions requiring the affidavit, or, in its absence, an order of court before judgment and requiring the appointment of counsel for the defendant if he be in the military service. Even where these requirements have all been met, yet if judgment has been rendered against a person in the military service he may have the same set aside within ninety days after his release from service provided of course he can show that he was prejudiced in making his defense by reason of his military service.

The plaintiff in this case having failed to file, prior to the entry of the judgment of default, an affidavit setting forth facts showing that the defendant was not in the military service, or, in the absence of such affidavit, hav-

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ing failed to secure an order of the court directing the entry of judgment, all subsequent proceedings were void.

The exception to the first question discussed being sustained the result will necessarily require that the judgment of default rendered by the court below and all subsequent proceedings had must be set aside and this of course will present to the defendant an opportunity to plead his defense, in which event the case may be heard upon its merits. And it becomes unnecessary for us to pass upon the other matters contained in the bill of exceptions.

Upon the ground that the court below failed to proceed in accordance with the mandatory provisions of the act of Congress, known as the Soldiers and Sailors Civil Relief Bill, the exceptions are sustained and the cause is remanded to the circuit court for proceedings consistent with this opinion.

*Andrews & Pittman* for plaintiff.

*G. A. Davis, W. T. Rawlins and E. J. Botts* for defendant.

## PARTIALLY CONCURRING OPINION OF CIRCUIT JUDGE ASHFORD.

It is with extreme reluctance, and with serious misgivings as to the accuracy of my position, that I concur in so much of the foregoing majority opinion as holds that the defendant, not being in the military service, was entitled to insist that an affidavit to the effect that he was not in such service, should be filed before any judgment was entered. I heartily concur, however, in the finding that, if such affidavit was required at all, it was required precedent to the entering of the order or judgment of default.

The point at issue involves the question whether the action of the trial court, in proceeding to judgment without the filing of such affidavit, rendered its subsequent

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acts void, or merely voidable. The majority opinion holds that the Congressional Act, requiring the filing of the affidavit in question, being a mandatory act, must be complied with in order to sustain the jurisdiction of the court to proceed further. The correctness of this view does not appeal to me as clearly as I could wish, but, it is at least doubtful in my opinion, whether the acts of the trial court in entering the judgment of default in the absence of such affidavit, and thereafter proceeding to trial and final judgment, constituted anything more than error of law,—jurisdiction of the subject matter and of the person of the defendant being complete. No possible question of the accuracy of the majority opinion upon this point, could arise if the defendant had, in fact, been in the military service. But, because he was not in that service, it appears to me at least an open question whether the act of the trial court in ordering a default and proceeding to trial constituted anything more than harmless error. Many errors of law are committed by trial courts, not all of which are harmful to the losing party, and it is becoming more and more the aim and the usage of our courts of review to disregard harmless errors. But the majority of the court consider that the errors herein complained of went to the jurisdiction of the court, and rendered its further proceedings void. Because of my lack of abiding conviction that this position is erroneous, I do not feel impelled to dissent from it.

The majority opinion also holds that paragraph 4 of Article II of the Congressional Act has to do only with a judgment rendered after compliance with the prior provisions requiring the affidavit, or, in its absence, an order of court before judgment, and requiring the appointment of counsel for the defendant if he be in the military service,—and that even where all such requirements have been met, a judgment rendered against a person in the military

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service may be set aside after his release from service, provided he can show he was prejudiced in making his defense by reason of his military service. With respect to the holding last above referred to, I feel that it is quite outside the issues of the present case, and unnecessary to its decision. I therefore respectfully dissent from that portion of the foregoing opinion.

The result is, that I concur in sustaining the first exception mentioned in the majority opinion, and in ordering a new trial.

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**JAMES A. DWIGHT v. DAVID KALAUOKALANI,  
CITY AND COUNTY CLERK OF THE CITY AND  
COUNTY OF HONOLULU, TERRITORY OF  
HAWAII.**

**No. 1129.**

**SUBMISSION UPON AGREED STATEMENT OF FACTS.**

**ARGUED SEPTEMBER 24, 1918.**

**DECIDED SEPTEMBER 27, 1918.**

**COKE, C. J., KEMP, J., AND CIRCUIT JUDGE EDINGS  
IN PLACE OF QUARLES, J., ABSENT.**

**STATUTES.**

Act 197 of the Session Laws of 1917 extended to every registered voter of the Territory absent from the precinct of his residence on election day by reason of having been called into the military service of his country, either by the governor or the president, the right to vote at one of the polling places provided for by section 2 of said act.

**SAME—construction.**

Statutes which confer or extend the elective franchise should be liberally construed.



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OPINION OF THE COURT BY KEMP, J.

The agreed facts upon which this controversy depends are in substance as follows:

James A. Dwight is a resident of the City and County of Honolulu, Territory of Hawaii, and is a duly qualified and registered elector therein with a regular voting place as such elector in the fourth precinct of the fourth district in Honolulu. David Kalauokalani is the duly qualified and acting city and county clerk of the City and County of Honolulu. On or about the 10th day of July, 1918, the said Dwight was inducted into the military service of the United States under and by virtue of the Act of Congress known as the "Selective Service Act" and the said Dwight is now and has been at all times since the said 10th day of July, 1918, in the military service of the United States and is stationed in the military reservation of the United States known as Schofield Barracks on the Island of Oahu. The said city and county clerk has prepared a list of registered electors who have been called into and reported for active service but has included therein only the names of members of the national guard who have been called into and reported for active service and said list does not contain the name of the said Dwight or any other elector who is in the military service of the United States by operation of the said Selective Service Act or voluntary enlistment. The said clerk has refused to include the name of the said Dwight in said list of electors for the reason that the said Dwight was not called into military service as a member of the national guard.

The questions of law arising upon the foregoing agreed statement of facts are stated by the parties as follows:

"That the said James A. Dwight contends, and the said David Kalauokalani as city and county clerk aforesaid, denies, that under and by virtue of the said Act 197 of the Session Laws of 1917, he is entitled to exercise the right of suffrage while absent from the precinct in which

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he is registered, by reason of his military service as aforesaid."

"That the said David Kalauokalani, as said city and county clerk, contends, and the said James A. Dwight denies, that under and by virtue of the said Act 197 of the Session Laws of 1917, only members of the national guard who have been called out and reported for duty are entitled, under said Act, to exercise the right of suffrage when absent from the precinct in which they are registered, by reason of their military service."

"That the said James A. Dwight contends, and the said David Kalauokalani as said city and county clerk denies, that all registered electors in military service of the United States, quartered or stationed in any one of the military forts or reservations in the Territory of Hawaii, irrespective of whether he has entered said military service as a member of the national guard, by operation of the Selective Service Act, or otherwise, is entitled to exercise the right of suffrage when absent from the precinct in which he is registered, by reason of his military service."

The relief sought is stated by the parties as follows:

"Wherefore, the parties hereto submit the foregoing agreed statement of fact and the issues at law arising therefrom, and respectfully request of this honorable court a decision on the said questions involved, and should this honorable court rule and find that the name of the said James A. Dwight should be included in the said list or roll of electors entitled to vote at a military reservation, that a proper decree be made, directing the said David Kalauokalani to add the name of the said James A. Dwight to the said list or roll, and the names of all other electors of the city and county of Honolulu similarly situated as regards military service."

Act 197 of the Session Laws of 1917 is entitled "An Act to permit registered voters, while on military service within the Territory of Hawaii, to exercise the right of suffrage when absent from the precinct in which they are registered." Section 1 of said act declares "That no registered voter shall be deprived of his right to vote at any

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primary, county, city and county, or general election by reason of his absence from the precinct in which he otherwise would have the right to vote, provided such absence at the time such election is held is caused by being called into the service of the Territory or the United States by virtue of orders issued by either the governor of the Territory of Hawaii, or the president of the United States of America."

The above language sets forth in plain and unmistakable terms the legislative intent that every registered voter should be protected in his right to vote even though on election day such registered voter be absent from his regular voting place, provided only that such absence be caused by his being called into the service of the Territory or the United States by virtue of orders issued by the governor of the Territory or the president of the United States.

The Selective Service Act authorized the president of the United States to draft into the military service of the United States men of certain classes and did not, in the absence of an order issued by the president, operate to call or draft any one into military service. It therefore follows that one inducted into the military service of the United States under and by virtue of the Act of Congress known as the Selective Service Act is in fact called by virtue of an order issued by the president of the United States and is therefore in the class of men mentioned in section 1 of Act 197 Session Laws of 1917, who shall not be deprived of the right to vote by reason of absence from the precinct in which they otherwise would be entitled to vote.

Section 1 above quoted is the only part of the act which deals directly with the question of who is to be permitted to vote at a place other than the one in which he is registered. The remaining sections of the act are devoted to providing the machinery for carrying out the legislative intent as therein expressed.

## Opinion of the Court.

Section 2 provides that all mobilization grounds of the national guard of the Territory of Hawaii, or all places where such national guard may be congregated on active service are, for the purposes of any primary, county, city and county or general election, polling places within the meaning of all laws of the Territory of Hawaii relative to elections.

By the provisions of section 3 the duty is cast upon the governor of the Territory to appoint at each place at which troops are stationed within the Territory three special inspectors of election for each subdivision of the Territory authorized to choose candidates for office or to elect officers. By the provisions of section 4 it becomes the duty of the adjutant general of the Territory to transmit to the clerks of the several counties within a given time lists of names of members of the national guard who are registered voters of the Territory and have been called into and reported for active service; and also full information as to the voting precincts and districts of such persons and the places where such persons will probably be mobilized or serving at the date of such election. The manner in which the officials named are to procure the information necessary to enable them to perform the duties cast upon them is not pointed out in the act.

Under the provisions of section 6 it becomes the duty of the clerks of the several counties to transmit to the several special inspectors of election to be appointed by the governor under the provisions of the act "*official lists of registered electors who have been called into and reported for active service*", the said lists to contain the names of such registered electors together with their places of residence and precinct and district in which they reside, as shown by the great register." In the performance of this duty the clerks are not informed in what manner they are to procure the information necessary for them to possess in order to perform this duty except insofar as they may procure it from the list furnished them by the adjutant general.

## Opinion of the Court.

If we consider alone the language used by the legislature in section 1 of the act referred to we can have no doubt that every registered voter who is absent from the precinct in which he resides by reason of having been called into military service, either by the governor or the president, is entitled to his vote unless he be without the Territory. This interpretation of the statute is shaken only by the language used in some of the succeeding sections wherein the national guard seemed to be uppermost in the legislative mind when it came to provide the machinery for taking the soldier vote. For example, polling places are provided only at such places as the national guard is mobilized or stationed and the adjutant general is required to include in the list of names furnished by him to the several county clerks only the names of national guardsmen.

Bearing in mind the rule that statutes which confer or extend the elective franchise should be liberally construed (2 Lewis' Sutherland, 2 ed., p. 1241) we conclude that it was the intention of the legislature to extend to every registered voter of the Territory, absent from the precinct of his residence on election day by reason of having been called into the military service of his country, either by the governor or by the president, the right to vote and that every such person is entitled to vote at one of the polling places provided for by section 2 of said act.

It necessarily follows from what has been said that the city and county clerk of the city and county of Honolulu was not legally justified in his refusal to include the name of the said Dwight in the lists prepared by him for transmission to said special inspectors of elections.

A decree in accordance with this decision may be prepared and when approved by the justices will be entered of record in this cause, and it is so ordered.

*E. J. Botts* and *L. Andrews* for petitioner.

*W. T. Carden* for respondent.

*H. Irwin*, Attorney General, *amicus curiae*.

Opinion of the Court.

DAVID K. KAHAULELIO *v.* BEKE IHIHI AND KIN  
CHOY.

No. 1110.

ERROR TO CIRCUIT COURT, SECOND CIRCUIT.  
HON. L. L. BURR, JUDGE.

SUBMITTED OCTOBER 7, 1918.

DECIDED OCTOBER 10, 1918.

COKE, C. J., KEMP, J., AND CIRCUIT JUDGE DEBOLT IN  
PLACE OF EDINGS, J., DISQUALIFIED.

OPINION OF THE COURT BY COKE, C. J.

On a former occasion this cause was before us on exceptions (see 24 Haw. p. 292) where all matters now presented in the assignment of errors were passed upon by this court except that in addition it is now urged by the defendants that the court below erred in awarding damages to the plaintiff in the sum of \$642.80. We find no error in this respect. In our former opinion we sustained the exceptions of the plaintiff and remanded the cause to the circuit court for further proceedings consistent with the opinion of this court. Subsequently the circuit court entered judgment in accordance with our opinion. From this judgment the defendants bring this writ of error in order, we take it, to obtain the final judgment of this court, which is that the judgment of the circuit court is affirmed.

*Mott-Smith & Lindsay* for plaintiffs in error.

*J. Lightfoot* for defendant in error.

Syllabus.

TERRITORY *v.* I. M. COX.

No. 1116.

APPEAL FROM DISTRICT MAGISTRATE OF HONOLULU.

SUBMITTED OCTOBER 7, 1918.

DECIDED OCTOBER 16, 1918.

COKE, C. J., KEMP AND EDINGS, JJ.

**SCHOOLS AND SCHOOL DISTRICTS—*teachers—corporal punishment.***

A school teacher has the right to inflict reasonable corporal punishment upon his pupil for such misbehavior as has a direct and immediate tendency to injure the school or to subvert the master's authority but in so doing the master must exercise sound discretion and judgment and adapt the punishment to the nature of the offense and the character of the pupil.

**SAME—*same—same.***

The law, however, does not license the teacher to inflict corporal punishment at will, but, in the words of section 270 R. L. 1915, which is substantially the common law rule, the punishment must be necessary and reasonable.

**SAME—*same—same—malice.***

It is not necessary for the prosecution to prove malice on the part of the teacher where the punishment inflicted is clearly unnecessary or unreasonable but such malice will be inferred from the fact that unnecessary or unreasonable punishment was inflicted.

**SAME—*same—same—same.***

The teacher is not liable to criminal prosecution for assault where the punishment is not clearly unreasonable unless it appears that he bore malice against the pupil and whipped the latter to gratify his malice, ill will or grudge or for the purpose of being revenged on him.

OPINION OF THE COURT BY KEMP, J.

The defendant, I. M. Cox, having been convicted in the district court of the City and County of Honolulu of having committed an assault upon one William Furtado, appealed to this court upon points of law.

## Opinion of the Court.

It appears from the record before us that the defendant was at the time of the alleged assault principal of the Kalihi-waena school in Honolulu and that William Furtado was a pupil attending said school. A chastisement of William by the defendant for repeated misbehavior and disobedience was admitted and as we view the case as presented to us on appeal the defendant's contention is that there was not a scintilla of evidence tending to prove the commission of the offense charged in that it affirmatively appeared that the defendant acted in a kindly manner and for the best interests of his pupil and only to the extent necessary to maintain the discipline of the school, and that no malice was shown or any facts from which malice could be implied.

There are practically no adjudicated cases in this jurisdiction dealing with the questions here involved but fortunately the courts of many of the states have discussed fully the principles by which we are to be guided. An examination of these authorities as well as the text books and our statutes will enable us to ascertain the true rule by which the act of a schoolmaster is to be judged in a case of this nature.

Section 270 R. L. of Hawaii 1915 is to the effect that any teacher shall have power to administer necessary and reasonable punishment upon any pupil while in attendance at school and shall not in any way be held responsible therefor.

The teacher is responsible for the discipline of his school, and for the progress, conduct and deportment of his pupils. It is his imperative duty to maintain good order and to require of his pupils a faithful performance of their duties. If he fails to do so he is derelict in his duty. To enable him to discharge these duties effectually he must necessarily have the power to enforce prompt obedience to his lawful commands. For this reason the



## Opinion of the Court.

law gives him authority in proper cases to inflict corporal punishment upon refractory pupils.

The law, however, does not license the teacher to inflict corporal punishment at will but, in the words of our statute, which is substantially the common law rule, the punishment must be necessary and reasonable. Some authority considers a teacher *in loco parentis* and as exercising judicial functions whenever called upon to determine the gravity of an offense, and the character of the punishment that it merits. We have no hesitancy in disagreeing with the proposition that in such cases the teacher exercises judicial functions, and the other proposition that he is *in loco parentis* to his pupil we think is true only in a limited sense. The parent unquestionably is given a greater discretion in the punishment of his child than is the teacher in the punishment of his pupil. This greater, and to some extent irresponsible, power of control and correction is invested in the parent by nature and necessity. It springs from the natural relation of parent and child. It is felt rather as a duty than as a power. From the intimacy and nature of the relation and the necessary character of family government the law suffers less intrusion upon the authority of the parent, and the privacy of domestic life, than it does upon the authority of the teacher over his pupil. This parental power is little liable to abuse, for it is continually restrained by natural affection, the tenderness which the parent feels for his offspring, an affection ever on the alert and acting rather by instinct than reasoning. The schoolmaster has no such natural restraint. Hence he may not safely be trusted with all a parent's authority, for he does not act from the instinct of parental affection. He should be guided and restrained by judgment and wise discretion and is therefore held responsible for their reasonable exercise (*Lander v. Seaver*, 32 Vt. 114). Blackstone, the great expounder

## Opinion of the Court.

of English common law, said that the schoolmaster is *in loco parentis*, and has such a portion of the powers of the parent committed to his charge as may be necessary to answer the purpose for which he is employed. But an English annotator in a note to the passage very properly adds: "This power must be temperately exercised, and no schoolmaster should feel himself at liberty to administer chastisement coextensive with the parent." The trend of modern decisions, with a few exceptions, is to curtail rather than to enlarge the power of the master over the pupil, the courts all recognizing that every child has rights which ought to be protected against the brutality of a cruel teacher, but at the same time upholding the equally well established principle that the teacher's power of correction in the school must not be paralyzed and discipline thereby destroyed. We think therefore that the cases involving the right of the parent to chastise his child, while instructive, are not entitled to the decisive weight contended for by the defendant.

We have no doubt as to the correctness of the proposition that there is a greater limitation upon the rights of a teacher to inflict corporal punishment upon his pupil than upon the parent to punish his child, but we apprehend that it would be quite difficult to point out in a short general statement just the extent of that difference, and we see no occasion for our attempting to do so in this case.

It is also asserted by some very respectable authority, and contended by defendant in this case, that the schoolmaster is liable to prosecution only when he acts *malò animo*, from vindictive feelings, or under the violent impulses of passion or malevolence, or when he inflicts permanent injury upon his pupil, and that he is not liable for errors of opinion or mistake of judgment, provided he is governed by an honest purpose of heart to promote,

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by the discipline employed, the highest welfare of the school and the best interest of the pupil.

We find ourselves unable to approve this extreme view. The principle contended for has been repudiated by many of our courts. From the reported cases we glean the following principles: The schoolmaster has the right to inflict reasonable corporal punishment upon his pupil for such misbehavior as has a direct and immediate tendency to injure the school or to subvert the master's authority, but in so doing the master must exercise sound discretion and judgment and adapt the punishment to the nature of the offense and the character of the pupil. If the punishment is clearly excessive in the general judgment of reasonable men it exceeds the lawful limit and it may exceed the lawful limit even though it is not so excessive as to excite the instant condemnation of all men. It is not necessary for the prosecution to prove malice on the part of the teacher in the punishment of his pupil where the punishment inflicted is clearly unnecessary or unreasonable but such malice will be inferred from the fact that unnecessary or unreasonable punishment was inflicted. On the other hand, if the punishment is not clearly unreasonable the teacher is not liable unless it appears that he bore malice against the pupil and whipped the latter to gratify his malice, ill will or grudge or for the purpose of being revenged on him. 35 Cyc. 1139; *State v. Pendergrass*, 19 N. C. 365; *Commonwealth v. Randall*, 4 Gray (Mass.) 36; *Whitley v. State*, 25 S. W. 1072; *Lander v. Seaver*, *supra*; *Sheehan v. Sturges*, 2 Atl. 841; *Patterson v. Nutter*, 7 Atl. 273; *State v. Thornton*, 136 N. C. 610, 48 S. E. 602.

Applying these principles to the case at bar we fail to see on what evidence the magistrate based his finding of guilt. It appears that for repeated acts of disobedience and misbehavior the teacher administered not more than

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fifteen lashes with a small leather strap across the back and legs of his pupil (a boy whose age and size are not disclosed by the record) ; that he talked kindly to the boy before and after and during the time the punishment was being inflicted and was careful to avoid striking him on the buttocks where the boy at the time had a boil. There is not one syllable of evidence in the record as to how hard the blows were unless it be said that temporary marks which were left on the boy's back indicate the force with which they were struck. The boy does not even testify that he suffered temporary pain from the flogging and the only evidence there is of such pain are the marks on his body which endured for a few days only.

It necessarily follows from the teacher's right to inflict corporal punishment in a proper case that he has the right in such case to cause his pupil a reasonable amount of temporary pain and the mere fact that marks and no doubt some temporary pain resulted from the thrashing administered without any other evidence from which malice could be implied does not justify a conviction of the teacher upon a charge of assault.

We think that there is not sufficient evidence in this case to justify the conviction.

The judgment of the district court is reversed and the cause remanded.

*A. M. Brown*, City and County Attorney, for the Territory.

*P. L. Weaver* for defendant.

Syllabus.

TERRITORY v. KAPELIELA KAEHA.

No. 1094.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT,  
HON. C. W. ASHFORD, JUDGE.

SUBMITTED OCTOBER 11, 1918.

DECIDED OCTOBER 17, 1918.

COKE, C. J., KEMP AND EDINGS, JJ.

CRIMINAL LAW—*instructions.*

An erroneous instruction, clearly prejudicial, cannot be cured by another instruction which correctly states the law but does not call the attention of the jury to the erroneous instruction.

SAME—*same.*

The defendant in a criminal trial has the right to have the court instruct the jury in the law applicable to his contention, if supported by substantial evidence, however weak, unsatisfactory or inconclusive it may appear to the court.

MURDER.

Murder committed in the commission or attempt to commit a crime not punishable with death and not committed with extreme atrocity or cruelty is not, *per se*, murder in the first degree.

OPINION OF THE COURT BY EDINGS, J.

The defendant was tried in the circuit court of the first circuit of this Territory under an indictment charging him with murder in the first degree and was convicted by a jury of the crime of murder in the first degree.

The defendant now comes to this court on exceptions. The exception numbered two being the exception chiefly relied upon by counsel in his brief and in his argument will be here considered, together with exception numbered thirteen, the latter being to the overruling of defendant's motion for a new trial.

Exception No. 2. "That thereafter evidence having been adduced on the part of the prosecution and on the

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part of defendant, and the prosecution and defendant having rested, the court charged the jury on the law of the case, whereupon the following proceedings were had.

"The court addressing the jury, says:

" 'I again digress from the written request for instructions to instruct you, gentlemen, that there is nothing in this case to show any justification or legal excuse, or authority, justification or extenuation by law for the shooting by the defendant.'

"Mr. Lightfoot: 'At this time, may it please the court,'—

"The Court: 'Not at this time, sir, later on, if you wish'

"And further charging, the said court instructed the jury as follows:

" 'And I again digress from the written requests for instructions to instruct you that there is nothing shown in this case to indicate any just cause or provocation or authority or justification by law for the shooting in question.'

"That at the conclusion of said charge to the jury the defendant, by his attorney noted his exception to all of the instructions of the court and to the remarks on the ground that they were comment on the evidence, whereupon the following proceedings were had.

"The Court: 'What remarks do you refer to now?'

"Mr. Lightfoot: 'The remarks that the evidence in this case does not show that there was any extenuating circumstance. I don't remember the language used by the court.'

"The Court: 'If counsel, and Mr. Lightfoot is not the only one who has shown himself derelict in this respect, will only read the statutes, they will know more than some of them do now in regard to the scope of the powers of the court in addressing a jury with reference to the evidence. The court may not instruct the jury with reference to the weight or the credibility of the evidence, nor its strength or its weakness, or the manner or demeanor or reliability or credibility of any witness; all of these things are entirely and solely and exclusively within the scope of the jury's duty, but I may be pardoned for mentioning the fact that, as I drew that statute myself in 1892, I am

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fairly familiar with its terms, and one of the terms is that the court may always tell the jury whether there is or is not evidence upon any particular point or to support any particular conclusion. I therefore repeat to you, gentlemen, that there is no evidence in this case from which you would be justified in finding that there was any authority or justification in law, on the part of the defendant, for firing the shot which it has been testified was the cause of the death of Hoshino. Now, do you wish to take any further exception?"

"Mr. Lightfoot: 'Yes. I wish to take exception to the last remark of the court; that is, to all the last remarks of the court, made since I took my last exceptions.'

"The Court: 'The exception will be noted.' "

Tokuyo Hoshino, a witness called on behalf of the prosecution, testified in part as follows: That she was awakened by a terrible noise; that her father (the deceased) was crying out "All come and help, all come and help;" that there was a man there; that she got out on the veranda and heard the report of a pistol; that she saw her father and the defendant wrestling inside and outside of the room; that she saw one Nagahama striking the defendant over the head with a broom; that the defendant was at the head of the stairs at this time.

J. Nagahama, a witness on behalf of the prosecution, testified among other things as follows: That he heard Hoshino (the deceased) say, "I have caught hold—caught a robber;" that he (witness) grabbed a broom and came to the assistance of Hoshino; that when he got out they (the defendant and Hoshino) were in the hallway near the stairs; that he (witness) struck the defendant with a broom; that the defendant and Hoshino were struggling with each other; that while witness was striking the defendant the pistol was discharged.

Dr. Ayer, a witness on behalf of the prosecution, testified *inter alios* that the cause of the death was a gunshot wound on the right side of the heart; that the wound was

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badly burned, even into the wound; that there was a wound on the back of the head of the deceased, made with a blunt instrument.

The defendant, Kaeha, testified on his own behalf, in part as follows: That when he got to the room of the deceased the door was open about a foot and a half; that when he (defendant) was part in the room he heard a noise close to him and saw the deceased; that he could not get away and punched him (deceased); that he (defendant) then drew his revolver and struck deceased over the head with it; then he (defendant) turned round and tried to run; that deceased grabbed his (defendant's) coat at the back; that he then pulled the deceased out on the veranda; that he pulled him (deceased); that he pulled him all the way from his room until he almost reached the steps; that when he and the deceased got to the head of the steps he tried to strike the deceased with the revolver; that the deceased grabbed the revolver; that deceased had hold of the revolver by the barrel, trying to get it away from him (defendant), at the time the revolver was discharged; that at the time they were struggling for the revolver there was another Japanese beating him (defendant) over the head with a broom; that the revolver was discharged by the deceased pulling on the barrel of the revolver; that he went to the room of deceased to rob him.

The statute of this Territory defines murder in the first degree as: "Murder committed with deliberate premeditated malice aforethought; or in the commission or attempt to commit any crime punishable with death, or committed with extreme atrocity or cruelty."

The defendant in this case could only have been found guilty of murder in the first degree if the killing was with deliberate, premeditated malice aforethought, or committed with extreme atrocity or cruelty, because the deceased was killed while the defendant was committing or attempting



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to commit the crime of robbery, a crime which is not punishable by death in this Territory.

The instructions and comments of the trial judge, above recited, were unfair and prejudicial to the defendant and were not cured by any other instruction given at the trial.

An erroneous instruction, clearly prejudicial, cannot be cured by another instruction which correctly states the law, but does not call the attention of the jury to the erroneous instruction. *People v. Westlake*, 124 Cal. 452.

It is the exclusive province of the jury to determine all questions of fact in the case. *Clark v. Goddard*, 39 Ala. 164. Hence an instruction which takes from the jury a matter within its exclusive province, as for instance the degree of guilt of the accused, amounts to an invasion and is erroneous.

In this trial the attitude of the court was tantamount to an instruction to the jury to disregard the testimony of the defendant.

On a trial under an indictment for murder, where it is shown that the defendant killed the deceased by shooting him with a shotgun, and the evidence for the state tended to show that the killing was intentional, while the evidence for defendant tended to show that it was accidental, whether or not the killing was intentional or not is for the determination of the jury. *Dixon v. State*, 129 Ala. 54, 29 So. 623.

We have no hesitation in applying to this case the language used in *Territory v. Alcantara*, 24 Haw. 208-209: "The defendant in a criminal prosecution has the right to have the court instruct the jury in the law applicable to his contention, if supported by substantial evidence, however weak, unsatisfactory or inconclusive it may appear to the court. To refuse to so instruct the jury would be to evade its province in the trial of a case. The question is not whether, in the mind of the court, the evidence as a

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whole excludes the idea that the defendant is guilty of an inferior degree of the offense charged, but whether there is any substantial evidence tending to prove an inferior degree of the offense. If there is, then the question of such degree should be submitted to, and left for the determination of, the jury. The unsupported testimony of the defendant alone, if tending to establish such inferior degree, is sufficient to require the court to so instruct."

The other exceptions need not be considered as they involve questions which probably will not arise at the new trial, or if they do will arise under different circumstances.

The exceptions numbered two and thirteen are sustained and the cause is remanded to the circuit court for a new trial.

A. M. Cristy, First Deputy City and County Attorney (A. M. Brown, City and County Attorney, with him on the brief), for the Territory.

*Lightfoot & Lightfoot* for defendant.

Syllabus.

UNITED CHINESE SOCIETY, BY CHU GEM, GOO KIM FOOK, HO FON, TONG KAU, CHONG PAK SUN, PANG LUM MOW, WONG HOW, YEE MUN WAI AND M. C. AMANA, ITS TRUSTEES; AND CHU GEM, GOO KIM FOOK, HO FON, TONG KAU, CHONG PAK SUN, PANG LUM MOW, WONG HOW, YEE MUN WAI AND M. C. AMANA, *v.* YEE YAP, LAU TONG, YONG KWONG TAT, LEE CHUCK, LAM YAT KEUNG, LEE LAU, WONG SAI KUEN, C. F. ZEN AND CHIN CHAU.

No. 1128.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.  
HON. W. H. HEEN, JUDGE.

ARGUED OCTOBER 15, 1918.

DECIDED OCTOBER 24, 1918.

COKE, C. J., EDINGS, J., AND CIRCUIT JUDGE ASHFORD  
IN PLACE OF KEMP, J., DISQUALIFIED.

APPEAL AND ERROR—*effect of modification of decree.*

Where an appellate court merely modifies a decree of an inferior court in respect to a certain portion thereof that portion of the decree which is not modified is affirmed.

OPINION OF THE COURT BY COKE, C. J.

This controversy was recently before us (*ante* p. 377) and it appears unnecessary to again rehearse the history of the case. It is sufficient to say that in the former opinion we remanded the cause to the court below with instructions to modify the decree theretofore entered so as to provide for the appointment of a commissioner clothed with authority to prepare a roll or list of members of the society and to issue certificates of membership to those

## Opinion of the Court.

entitled thereto and to call and supervise an election to be held by the members of the society to fill a vacancy then existing in the board of trustees. The form or manner but not the substance of the relief was the effect of the modification of the decree. The circuit judge thereafter made and entered a modified decree. From this last decree the respondents have again appealed and now urge for our consideration, first, that the decree or judgment appealed from is erroneous for the reason that the evidence adduced by the petitioners did not prove the allegations of the petition and did not make out a case entitling the petitioners to the relief prayed for or granted or any relief against the respondents, and, second, that the decree or judgment appealed from was inappropriate and inadequate for the reason that the length of the term for which the trustee to be elected by vote of the society was not defined by the decree and the matter was left open for further dispute and controversy.

The first question raised was presented at the prior hearing of the cause and at that time had the consideration of this court. It was then our opinion that there was sufficient evidence to warrant the circuit judge in finding that the petitioners were entitled by *quo warranto* to the relief against the respondents granted in the decree. To this conclusion we adhere.

This phase of the case was not commented upon, however, in our former opinion. We simply disposed of it by sustaining the decree in respect thereto, assuming, perhaps erroneously, from the argument and the attitude of counsel for the respondents that this feature of the case was entirely subordinate to the desire of respondents to have the decree of the lower court modified so as to provide for the preparation of a correct roll of membership of the society, the absence of which roll, it was asserted, was and is the root of the controversy. It was urged by

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counsel that by this means, and by this means alone, could a lasting termination of this litigation be brought about. In view of this attitude we directed our opinion to this latter phase of the case, and, coinciding with the views of counsel for respondents, directed a modification of the decree of the circuit judge along those lines. Counsel now complains that we did not pass upon the first, and what he now terms the main, question presented by the appeal.

We think counsel for respondents misinterprets the effect of our order modifying the decree of the lower court. Where an appellate court merely modifies a decree of an inferior court in respect to a certain portion thereof that portion of the decree which is not modified is affirmed. This clearly was the effect of the former opinion of this court. The decree of the circuit judge was remanded for modification in one particular. In every other respect the decree was affirmed.

"When causes are appealed or brought here on error, we have before us the entire record and may review, reverse, affirm, amend, modify or remand for new hearing in chambers such decision, judgment or decree in whole or in part and as to all or any of the parties." *Meheula v. Pioneer Mill Co.*, 17 Haw. 91, 94.

"Modify means to change or vary, to qualify or reduce, and the power given to modify implies the existence of the subject-matter to be modified. When exercised to modify it does not destroy identity, but effects some change or qualification in form or qualities, powers or duties, purposes or objects, of the subject-matter to be modified, without touching the mode of creation; and the word employs no power to create or bring into existence, but only the power to change or vary in some particular an already created or legally existing thing." *Words and Phrases*, vol. 5, p. 4552.

The second ground of this appeal goes to the failure

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of the circuit judge to fix in the decree the term for which the trustee to be elected by the society is to hold office. We are of the opinion that the decree is faulty in this respect. To avoid uncertainty and confusion and possibly further dispute and controversy we hold that the decree appealed from should be modified or amended so as to provide that the trustee to be elected to fill the vacancy now existing in the board of trustees of said society, which vacancy was caused by the failure to elect Chu Gem as trustee at the election held in December, 1913, should hold office as such trustee until his successor is duly elected but in no case for a longer period than three years. And inasmuch as the periods of time prescribed and the dates fixed in the decree for carrying out the purposes and objects thereof have by reason of this appeal expired the decree should be further modified or amended so that new periods of time and new dates will be designated in lieu of the expired periods and dates. And aside from these modifications or amendments herein specified the decree appealed from is in all respects affirmed.

The cause is remanded to the circuit judge with directions to modify or amend the decree conformably to this opinion.

*W. B. Lymer* (*J. J. Banks* with him on the brief) for petitioner.

*A. G. M. Robertson* (*Robertson & Olson* and *R. W. Breckons* on the brief) for respondents.

Syllabus.

LEONG SAM v. HARRY KELIIHOOMALU.

No. 1122.

EXCEPTIONS FROM CIRCUIT COURT, FOURTH CIRCUIT.  
HON. C. K. QUINN, JUDGE.

SUBMITTED OCTOBER 14, 1918.

DECIDED OCTOBER 28, 1918.

COKE, C. J., KEMP AND EDINGS, JJ.

**PLEADING—*effect of evidence on nature of action.***

Where the complaint sets up a case of damages for assault and battery and the defendant answers by general denial, but defendant, a police officer, offers evidence tending to justify his action on the ground that such violence as he used was necessary in arresting plaintiff for a penal offense committed in his presence and plaintiff offers evidence tending to show that no offense had in fact been committed and that more force than was reasonably necessary to effect an arrest was used, held, that this did not change the case to one for false imprisonment.

**ASSAULT AND BATTERY—*liability of peace officer in making arrest.***

A peace officer is not liable for injuries inflicted by him in the use of reasonably necessary force to preserve the peace and maintain order or to overcome resistance to his authority; but is liable if unnecessary violence is used to accomplish the purpose or if he assaults a person without just excuse.

**SAME—*instructions.***

In an action for assault and battery it is not error to refuse requested instructions not applicable to such a case.

OPINION OF THE COURT BY KEMP, J.

The first material inquiry in this case is as to the nature of the plaintiff's action. Is it an action for damages for false imprisonment or an action for damages for assault and battery?

The material allegations of the complaint follow:

"The undersigned, Leong Sam, residing at Olaa, County and Territory of Hawaii, claims of Harry Keliiahoomalu, defendant, residing at Olaa, County and Territory of

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Hawaii, the sum of Two Thousand (\$2000.00) Dollars, for actual and exemplary damages resulting to him from injury done by the said defendant to his person and his feelings, in that the defendant did on or about the 24th day of August, 1917, in plaintiff's place of business, at Olaa, County and Territory of Hawaii, wrongfully, unlawfully, maliciously and with violence assault plaintiff by taking hold of plaintiff's arm and with force and violence twisted plaintiff's arm then and thereby dislocating plaintiff's arm at his shoulder; that defendant threw plaintiff violently to the floor thereby causing injury and pain to plaintiff; that immediately after dislocating plaintiff's arm and throwing plaintiff to the floor as aforesaid, defendant took plaintiff to the county jail at Olaa, County and Territory of Hawaii, and placed plaintiff in said jail, and in said jail searched plaintiff's person, and caused plaintiff to be imprisoned and kept in said jail for a period of about fifteen minutes; that by reason of the injuries aforesaid plaintiff has suffered and now suffers great physical pain; that by reason of said injuries plaintiff was compelled to procure the services of a physician to reduce said dislocation and in that behalf has incurred liabilities and debts in the amount of twenty-five (\$25.00) dollars; that by reason of said injuries, plaintiff was unable for a period of five days personally to attend to his business, and plaintiff's services during that period were and are reasonably worth the sum of twenty-five (\$25.00) dollars. Wherefore plaintiff prays judgment for the sum of Two Thousand (\$2000.00) Dollars, together with the costs of court," etc.

The defendant's answer was a general denial under which he was entitled to give in evidence as a defense any matter of law or fact whatever. (Sec. 2369 R. L. 1915.)

The defendant's contention is that the foregoing complaint sets up an action for damages for assault and battery only and cannot be construed as alleging a case of false imprisonment. On the other hand the plaintiff maintains that his action is for damages for unlawful arrest and imprisonment (false imprisonment) and was so



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construed by the parties and by the court upon the trial. He further contends that having been so treated and understood throughout the trial that it is now too late to object to its being so treated.

Counsel has not called our attention to any authority bearing on the question of whether the treatment of an action by the parties and the trial court as being of a nature other than that made out by the pleadings would, after verdict and judgment, justify us in so treating it. We are familiar with the rule announced in *County of Hawaii v. Purdy*, 22 Haw. 272, to the effect that where a complaint was defective in that a material fact was not alleged and at the trial the material fact with other facts was stipulated without objection and the plaintiff recovered judgment the defect was cured by the stipulation and judgment. In *Machado v. Mitamura*, 24 Haw. 224, the *Purdy* case was approved and it was held that where evidence was received *pro* and *con* as to a certain element of damage and the case tried on the theory that the element of damage had been pleaded, it was too late after verdict to complain of the insufficiency of the pleadings as a justification of the evidence admitted.

But we do not think that the rule should be extended to allow a plaintiff to come into court upon a complaint setting up one cause of action and then by reason of the fact that evidence tending to establish and refute a case of an entirely different nature was received claim that his action was changed in its nature.

The nature of this action then must be determined by the pleadings alone and we think that it is essentially an action for damages for assault and battery. The reference in the complaint to the arrest and incarceration of plaintiff by defendant is clearly descriptive of the assault which the plaintiff alleges the defendant committed upon him and cannot be said to have changed the complaint into one

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for false imprisonment. This conclusion is further supported by the fact that the only injuries for which plaintiff claims actual damages are physical pain from a dislocated shoulder, doctor's bill, and loss of time from his business caused by the same injury. Moreover we think that the record fails to disclose that this case was treated and considered as anything but a case of assault and battery by the parties and the court at the trial. The court told the jury:

"This is an action brought by the plaintiff against the defendant to recover actual and exemplary damages for injuries alleged to have been wrongfully, unlawfully, maliciously and with violence, inflicted upon the plaintiff by the defendant. In measuring the actual or compensatory damages, you must consider any bodily suffering, mental suffering, loss of time while incapacitated for business, and expenses of physicians' bills, whether paid or not, which the evidence shows plaintiff has sustained and incurred, and exemplary or punitive damages are allowed when it appears that the defendant was actuated by malicious motives, as, for instance, when a violent assault and battery has been committed without any apparent provocation, or upon slight and inadequate provocation.

"In this case if you find from a preponderance of the evidence that the defendant committed an unlawful assault and battery on the plaintiff and that the plaintiff suffered physical and mental pain; loss of time while incapacitated; and incurred debts or liabilities on account of necessary services of a physician, no matter whether such debts or liabilities for physician's services have been paid or not, then your verdict should be for the plaintiff and should be in such sum as to give the plaintiff just compensation for the injuries received, as shown by the evidence, and if you further find from a preponderance of the evidence that the defendant did commit an assault and battery on the plaintiff and that in committing the same the defendant was actuated by malicious motives, or by a wilful intent to do a severe bodily injury to the plaintiff, you may go beyond the rule for just compensation to the plaintiff for the

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injury received and allow exemplary or punitive damages; exemplary or punitive damages as above indicated are allowed as a punishment, and, for the sake of example, to deter others from committing like offenses. Total damages, however, in excess of the sum of two thousand dollars should not be allowed to the plaintiff.

"Malice which will authorize a recovery of exemplary or punitive damages may be actual or presumed. Malice in common acceptation means ill will against a person; but in its legal sense it means a wrongful act, done intentionally; without just cause or excuse. Malice which is presumed or malice in law, as distinguished from actual malice or malice in fact, is not personal hate or ill will of one person toward another; it refers to that state of mind which is reckless of law and of the legal rights of the citizen in a person's conduct toward that citizen.

"Mere words never justify an assault. Abusive language and epithets, used by the plaintiff against the defendant, if you find from the evidence that such language was used, is no justification for an assault and battery on the plaintiff by the defendant.

"If an officer has a right to make an arrest, the one arrested has no right to resist. And conversely, if an officer unlawfully attempts to arrest a person, such person may lawfully resist the officer. Whatever I may lawfully enjoy, I may lawfully defend. In the protection of my own rights, whatever is (un)lawful for another to do, it is lawful for me to prevent him from doing.

"Our statute provides that 'where the person arrested refuses to submit or attempts to escape, such degree of force may be used as is necessary to compel him to such submission.' Under this statute the amount of force which may be lawfully used in effecting an arrest is no more than is reasonably necessary under all the circumstances to secure the arrest and safe custody of the accused. If he uses more force than the occasion calls for, he is guilty of assault and battery.

"If from the preponderance of the evidence in this case you find that the plaintiff had committed no criminal offense in the presence of the defendant, then you are instructed as a matter of law, that if from the evidence you

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find that the defendant made an unlawful assault on the plaintiff, and that the plaintiff was injured in such assault, then the plaintiff is entitled to recover such damages as the evidence shows he has suffered, if any, not in excess of the sum of two thousand dollars."

The above instructions, given at plaintiff's request, certainly do not contain any language which would indicate that the plaintiff or the court considered the action other than one for damages for assault and battery, and such references as there are in said instructions to the rights of an officer in making an arrest were intended to inform the jury as to what would amount to assault and battery by an officer in making an arrest.

The same may be said of instructions given at the request of defendant and such evidence as was offered and admitted tending to show whether the defendant was lawfully or unlawfully attempting to arrest the plaintiff when the plaintiff received the injuries of which he complains.

A peace officer is not liable for injuries inflicted by him in the use of reasonably necessary force to preserve the peace and maintain order or to overcome resistance to his authority; but if unnecessary violence is used to accomplish the purpose, or he assaults a person without just excuse, he becomes a trespasser and is liable as such. (3 Cyc. 1076 and cases cited.)

Under the pleadings the defendant was entitled to show, if he could, that in doing what he did he was undertaking to lawfully arrest the plaintiff, from which showing it would follow that he was not guilty of an assault and battery if no more force was used than was reasonably necessary to effect the arrest. Likewise the plaintiff was entitled under the pleadings to show, if he could, that the defendant was attempting an unlawful arrest of the plaintiff in order to show that whatever force was used amounted to an assault and battery, or failing in this, to show that more force than was reasonably necessary was

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used and thus establishing his case. This, it seems, was the theory on which the case was tried—the only theory warranted by the pleadings.

The trial resulted in a verdict and judgment in favor of the defendant and the plaintiff duly excepted and filed his motion for new trial and in said motion alleged as grounds thereof the following:

“That the verdict rendered by the jury is contrary to the law, the evidence and the weight of the evidence, in that among other things the evidence conclusively shows that more force was used by the defendant than was reasonably necessary to place the plaintiff under arrest.

“For error committed by the court in refusing to give plaintiff’s request for instructions Nos. seven, eleven and twelve, in general and particularly because the defendant having arrested plaintiff and the defendant having failed to take the plaintiff before the court having jurisdiction of the offense for which the plaintiff was arrested, and the defendant having voluntarily released plaintiff from custody, the defendant became a trespasser from the beginning.”

The motion was granted and a new trial ordered because the court, as stated by it, “feels that prejudicial error was committed in refusing to give plaintiff’s requested instructions eleven and twelve,” to which ruling the defendant duly excepted and an interlocutory bill of exceptions having been approved by the court the ruling of the court in granting the new trial is before us for review.

Instructions numbers eleven and twelve, which the trial court now feels it was prejudicial error to refuse and because of which the new trial was granted, are as follows:

“No. 11. If from the preponderance of the evidence in this case you find that the plaintiff did commit a criminal offense in the presence of the defendant, and that defendant arrested plaintiff for that offense, and that defendant did not take plaintiff before the court having jurisdiction

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of the offense, and that the defendant voluntarily released plaintiff from custody, then you are instructed as a matter of law that the defendant is liable to the plaintiff for the injury, if any, which the evidence shows he received at the hands of the defendant in making the arrest."

"No. 12. If you find from the preponderance of the evidence in this case that the defendant arrested the plaintiff without warrant, for a misdemeanor committed in the defendant's presence and that defendant having so arrested plaintiff did not bring the plaintiff before the court and did not procure a warrant or file a charge against him for the alleged misdemeanor and that defendant voluntarily released plaintiff from custody, then I instruct you as a matter of law that the failure of the defendant to so proceed made him a trespasser from the beginning."

Number seven, which was also refused, need not be set out as it is of like import as the ones quoted.

These instructions were properly refused. To have given them would have tended to mislead rather than enlighten the jury.

This case being, as we have found, one for damages for assault and battery and not one for false imprisonment, to have given the requested instructions would have been equivalent to telling the jury that a refusal on the part of the defendant to continue to do violence to the plaintiff's person by keeping him incarcerated until he could be brought before a magistrate or a charge properly lodged against him would make such violence as he had theretofore inflicted upon plaintiff in effecting his arrest unlawful regardless of any justification that existed at the time. This we cannot conceive to be the law.

We do not deem it necessary for us to decide, and we do not decide, whether the instructions refused correctly stated the law as applicable to a suit for damages for false imprisonment. Our remarks are applied only to the character of case before us.

The questions of fact raised by the pleadings and the

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evidence were appropriately submitted to the jury upon the trial and the jury has determined those facts. The verdict was amply supported by the evidence which was conflicting, especially as to whether the plaintiff had committed a penal offense in the presence of defendant; as to whether he resisted arrest and as to whether the dislocation of his shoulder was due to his own fault or to violent handling of him by defendant. The evidence was so conflicting that it would have amply supported a verdict in favor of either party.

We conclude that the motion for new trial showed no sufficient reason for setting aside the verdict of the jury and should have been overruled.

The exception to the ruling of the court in sustaining the motion for new trial and the order granting a new trial is sustained.

*H. L. Ross* for plaintiff.

*J. W. Russell* for defendant.

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TERRITORY *v.* LINCOLN L. McCANDLESS

No. 1111.

RESERVED QUESTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

HON. W. H. HEEN, JUDGE.

ARGUED OCTOBER 8, 1918.

DECIDED OCTOBER 31, 1918.

COKE, C. J., KEMP AND EDINGS, JJ.

WAR—*authority of Congress to fix prices of foods.*

Congress possesses authority under the war-power conferred by the Constitution of the United States to enact laws regulating the prices of food and other commodities which may be helpful to the nation while engaged in war.

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**SAME—same.**

This authority to legislate is conferred upon Congress by those constitutional provisions which grant to it power to declare war, to raise and support armies, etc., and which is known as the war-power of Congress.

**SAME—states and territories.**

The foregoing power is not enjoyed by the states and territories.

**STATES AND TERRITORIES—*authority to control private property and to fix prices.***

The states and territories may regulate common carriers, inn-keepers, warehousemen, etc., whenever they enjoy extraordinary legal privileges or constitute a monopoly.

**SAME—same—police power.**

The police power is broad in its scope but it is subject to the just limitation that it extends only to such measures as are reasonable in their application and which tend in some appreciable degree to promote, protect or conserve the public health, morals or safety or the general welfare.

**CONSTITUTIONAL LAW—*limitation upon the authority of the state to interfere with the privileges of the individual.***

It is unlawful to interfere with the privileges of the individual to seek and obtain such compensation as he can for his private property where he neither asks nor receives from the sovereign power any special right or immunity not given to or possessed by every other citizen and where he has not devoted his property to any public use so that the same becomes impressed with a public interest within the meaning of the law.

**SAME—same—territorial statutes regulating the price of food.**

A territorial statute creating a commission clothed with authority to fix the price or prices at which food or foods shall be sold within the Territory held unconstitutional.

## OPINION OF THE COURT BY COKE, C. J. .

The defendant, L. L. McCandless, was charged in the circuit court of the first judicial circuit with having intentionally and unlawfully sold a bag of Hawaiian grown rice of one hundred pounds weight, charging and receiving therefor more than the sum of eight dollars from the purchaser thereof in violation of the provisions of a



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certain regulation of the Territory of Hawaii made and dated May 3, 1918. The case now comes to this court upon reserved questions of law from the circuit court. The reserved questions are as follows:

"1st—Are the provisions of Section 8, Act 221 of the Session Laws of 1917, in so far as they attempt to confer upon the Food Commission of the Territory, by said act created, the power and authority to fix, or control by fixing, the price or prices at which food shall be sold within the Territory, void as contrary to the provisions of Section 55 of the Organic Act extending the legislative power of the Territory 'to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States locally applicable?'

"2nd—Are the provisions of Section 8, Act 221 of the Session Laws of 1917, in so far as they attempt to confer upon the Food Commission of the Territory, by said act created, the power and authority to fix, or control by fixing, in advance, or otherwise, the price or prices at which food shall be sold within the Territory, null and void in that they are inconsistent with the laws of the United States locally applicable, undertake to penalize acts already made penal by the laws of the United States, to-wit, the Act of Congress of the United States of August 10, 1917, entitled 'An Act to provide further for the national security and defense by encouraging the production, conserving the supply and controlling the distribution of food products and fuel,' being Chapter 53 of the Statutes of the United States of America passed by the first session of the 65th Congress of 1917?

"3rd—Do the provisions of Section 8, Act 221 of the Session Laws of 1917, in so far as they attempt to confer upon the Food Commission of the Territory, by said act created, the power and authority to fix, or control by fixing, in advance, or otherwise, the price or prices at which food shall be sold within the Territory of Hawaii, abridge the privileges and (or) immunities of citizens of the United States, or deny to defendant the equal protection of the laws or deprive defendant of property without due process of law, and in this respect are they contrary to

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the provisions of Articles 5 and 14 of the Amendments to the Constitution of the United States?

“4th—Does the alleged regulation of May 3rd, 1918, of the Food Commission of the Territory discriminate against growers of Hawaiian rice in favor of rice grown elsewhere than in Hawaii, or does it punish in respect to the sale of Hawaiian grown rice what is permitted as lawful in respect to the sale of foreign grown rice, and is it in these respects, or either of these respects, unequal in its operation, unreasonable, unjustly and (or) illegally discriminatory and (or) impinge the provisions of Articles 5 and 14 of the Amendments of the Constitution of the United States in respect to equal protection of the laws and deprivation of property without due process of the laws?

“5th—Are the provisions of Section 8, Act 221 of the Session Laws of 1917, illegal and void as an attempt by the Territory to exercise powers necessarily incidental to declaring war, supporting armies and maintaining a navy, the powers over and concerning which are reposed exclusively in the Congress of the United States under the provisions of Article 1, Section 8, Clauses 11, 12 and 13 thereof?

“6th—Does the information set forth facts sufficient to constitute an offense against the Territory of Hawaii?”

The reservation involves the constitutionality of section 8 of Act 221 of the Session Laws of 1917 and the regulation of May 3, 1918, passed by the territorial food commission under the powers reposed in it by that section, and to this phase of the cause we will direct our attention.

The act of the legislature of the Territory of Hawaii of the session of 1917, and known as Act 221, is entitled “An Act creating a commission to increase, conserve, regulate and control the food supplies of the Territory of Hawaii, and defining its powers and duties and making an appropriation for the purposes thereof.” This act provides for the appointment of a commission and defines its general duties as follows:

“Section 4. General duties. During the period that the

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United States shall be at war and for such further period as shall be reasonably necessary, it shall be the general duty of the commission to encourage and in every practicable manner to seek to increase the production of food within the Territory both for shipment to the mainland and so that there may be produced within the Territory, as nearly as may be, sufficient food to supply all local needs; also in every practicable manner to conserve and prevent the waste of food whether direct or indirect, including the improper or uneconomic use thereof."

Section 5 of the act defines the general powers of the commission and section 8, which is the basis of this controversy, is as follows:

"Section 8. Regulation of prices. Whenever in the opinion of the commission the circumstances justify and the public interest requires such action, it shall investigate, and, in so far as it is not prevented by the constitution or laws of the United States, may by regulation fix or control the price or prices at which any food or foods shall be sold within the Territory so that the same shall be reasonable, and to prevent unreasonable discrimination between localities, or between users or consumers under substantially similar conditions."

It should be stated at the outset that there is no disposition by the defendant to question the authority of Congress to enact, under the war-power conferred by the Constitution of the United States, plenary laws regulating the prices of foods and other commodities which may be helpful to the nation while engaged in war. This authority to legislate is conferred upon Congress by those constitutional provisions which grant to it power to declare war, to raise and support armies, etc., and which is known as the war-power of Congress. In the exercise of this authority Congress, shortly after the commencement of war between the United States and the Imperial German government, in April, 1917, passed what is known as the Federal Food Control Bill, which authorized the Presi-

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dent of the United States by reason of the existence of a state of war and for the national security and defense, the successful prosecution of the war and the support and maintenance of the army and navy, to exercise the power of regulation and control over foods, fuel and numerous other commodities mentioned and to fix the prices of wheat and of coal and coke, and whenever it is deemed essential to carry into effect the provisions of the act the President might by proclamation require licenses to be obtained for the importation, manufacture, storage and distribution of necessities. By virtue of this authority the President did by proclamation dated the 8th day of October, 1917, require all persons engaged in distributing, buying and selling rice, rice flour and many other commodities mentioned in the proclamation to obtain licenses therefor, and profiteering in any necessity (rice, etc.) is made unlawful and punishable.

It cannot be questioned that by reason of the existing state of war and under its war-power Congress had the authority to pass the Federal Food Control Act and therein to authorize the President to fix the prices of certain commodities and to make unreasonable profiteering in others a crime. It however must be constantly borne in mind that this was a war measure pure and simple, enacted exclusively under the authority of the war-power of Congress. The authority to enact such a statute is incident to the clauses of the Constitution giving Congress power "to declare war \* \* \*, to raise and support armies \* \* \*." Art. I, Sec. 8. Under the same grant of power Congress passed the Selective Draft Act, which was recently sustained by the Federal Supreme Court (245 U. S. 366), and many other statutes. The police power of the Federal government, as well as of the various states and territories, can be exercised in either peace or war times, and is a power of government entirely separate and dis-

## Opinion of the Court.

tinct from the war-power of Congress reposed in it by the Federal Constitution. The latter power is not enjoyed by the states or territories and the act of the legislature now under consideration must be sustained, if at all, as being rightful legislation under the general police powers of the Territory. This distinction being recognized a solution of the question is rendered less difficult. Counsel for the Territory make no claim that the Territory possesses authority to legislate under what is known as war-power nor do they claim that the act in question is in any sense a war measure intended to affect the war status of the Federal government. They assert that the legislature was authorized under its general police power to pass the act and that the only effect the existence of the war had upon the legislation was that the war created an emergency which justified it. The issues are thus narrowed and it becomes only necessary to determine whether under the Federal Constitution the legislature of Hawaii possesses authority to regulate the prices at which foods and other articles of commerce may be sold in normal times, and if such authority does not exist, yet, whether by reason of the present abnormal condition of the times, the authority for the legislation does exist.

Aside from the right of the state to take the property of the citizen for public uses upon just compensation being made therefor it may take a portion of his property by way of taxation in support of the government. It may control the use and possession of his property so far as may be necessary for the protection of the rights of others and to secure to them the equal use and enjoyment of their property. It may exercise control over the property of the citizen even to the extent of destroying it to arrest a conflagration or the ravages of pestilence or it may take it under the pressure of an immediate and overwhelming necessity to prevent a public calamity.

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The act in question had for its purpose the increase, conservation, regulation and control of food supplies within the Territory. It is not recited in the act itself nor is it otherwise made to appear that at the time of the passage of the enactment there was an immediate and overwhelming necessity for the legislation in order to prevent a public calamity, and while there may have existed a greater reason for an exercise of legislative control of the price of rice by reason of the existence of the state of war yet the law cannot be justified upon that ground. In other words, if the legislature of the Territory possessed the authority to enact the law during war times it possessed an equal authority to do so in peace times.

The controlling question in this case is, Do the provisions of section 8 of Act 221 of the Session Laws of 1917, in so far as they attempt to confer upon the food commission of the Territory by said act created the power and authority to fix, or to control by fixing, in advance, or otherwise, the price or prices at which food shall be sold in the Territory of Hawaii, abridge the privileges and (or) immunities of citizens of the United States or deny to defendant equal protection of the laws or deprive defendant of property without due process of law, and in these respects are they contrary to the provisions of articles 5 and 14 of the amendments to the Constitution of the United States? The point has been made that this court has already expressed the opinion that the fourteenth amendment to the Constitution of the United States applies only to states and does not apply to the territories. *Robertson v. Pratt*, 13 Haw. 590, 598. While we are not prepared to say that we would concur in the former expressions of this court thus announced it is conceded that article 5 of the amendments to the Federal Constitution does apply to the territories. This amendment provides that no person shall be deprived of life, liberty or property without

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due process of law, nor shall private property be taken for public use without just compensation.

Counsel for the Territory submit that the territorial statute and the regulations of the commission fixing the price of rice constitute a proper exercise of the police power of the Territory and are not prohibited by article 5 of the amendments to the Constitution. Counsel cite in support of their position various statutes regulating the use of private property which have been sustained by the courts throughout the land, among which are statutes regulating common carriers and railroads, inn-keepers, wharfingers, ferrymen, millers, warehousemen, companies supplying water and gas, stockyard companies, telephone and telegraph companies, places of amusement, hackmen, and the protection and preservation of wild game, and statutes regulating the interest on money. The fixing of maximum rates of interest has always been upheld without question, the long established historical usage being regarded as sufficient justification. It is only the assertion of a right of government to control the extent to which a privilege granted by it may be exercised and enjoyed. By the ancient common law it was unlawful to take any money for the use of money and all who did so were called usurers—a term of great reproach—and were exposed to the censure of the church; and if after the death of a person it was discovered that he had been a usurer while living his chattels were forfeited to the king and his lands escheated to the lord of the fee. No action could be maintained on any promise to pay for the use of money because of the unlawfulness of the contract. While the common law thus condemned all usury Parliament interfered and made it lawful to take a limited amount of interest. The regulation of grist mill tolls has been sustained upon the ground that from the early colonial times mills have always been aided by legislation in the public interest. Leg-



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isolation regarding railroad charges was sustained for the reason that the business of a railroad calls for extraordinary legal privileges in the exercise of eminent domain—has some of the features of a *de jure* as well as of a *de facto* monopoly. In the majority opinion of the court in the renowned case of *Munn v. Illinois*, 94 U. S. 113, the constitutionality of the state legislation fixing warehouse rates was sustained upon the ground that the business of grain elevators in the city of Chicago, a “gateway of commerce,” constituted a virtual monopoly. The same may be said of the decision in *Budd v. New York*, 143 U. S. 517. These were known as the granger cases, and in both cases strong dissenting opinions were rendered. In *Spring Valley Water Co. v. Schottler*, 110 U. S. 347, it was held that the state may regulate the price of water if the supply is monopolized. When the constitutional power to regulate prices and charges is examined on principle it will be found to extend only to those classes of business claiming special privileges at the hands of the community. In nearly all cases the privilege is of such character that it cannot be indiscriminately given and therefore the business constitutes a *de jure* monopoly and in all cases the enjoyment of special privileges removes the business from a condition of equality with purely private enterprises. The enjoyment of special rights and powers demands and justifies the exercise of special control. This consideration applies to all enterprises in behalf of which the power of eminent domain is exercised or which use public highways in a special and exclusive manner: railroads, canals, bridges, turnpikes, telegraph, telephone, water, gas and electric conduits; the right to keep a ferry being treated as a franchise falls under the same principle. A mill which uses water-power is very commonly granted special privileges in regard to overflow. The keepers of cabs and hacks enjoy special rights if they have permanent stands



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on city streets. The opinions in the granger cases strongly relied upon the monopolistic character of the business. The monopoly in these cases was not a legal one but it was held to exist virtually and *de facto*. The argument of special privileges does not avail in such a case to justify the regulation of charges, but since the common regulating factor, competition, is absent, a condition is presented which calls for the exercise of the police power for the prevention of oppression. The police power is exercised for the prevention of monopolies where they rest upon preventable machinations; it follows that where a monopoly is inevitable by reason of natural conditions the power must exist to minimize its detrimental effects. Where physical conditions are naturally limited for carrying on some business a case arises for special control, and this will often be true of mill and wharf rights; but it is also possible that economic conditions will tend to make a business a monopoly. See Freund on Police Power, pp. 387, 388.

The power of the legislature to prescribe a closed season for game and fish, even though the same may incidentally affect game and fish privately owned and propagated, has always been treated as within the proper domain of the police power. See *Lawton v. Steele*, 152 U. S. 133; *People v. Bridges*, 142 Ill. 30, 41; *Territory v. Hoy Chong*, 21 Haw. 39.

So far as we are advised, aside from the act of the legislature of Hawaii now under consideration, no state or territory in the United States has ever enacted a law which attempted to fix the prices of farm products or other commodities privately owned, which are not impressed with a public interest as hereinabove defined, and no court, either Federal or state, has ever by expression or by inference indicated that any such a law could find justification under the police power of the state. The only

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regulation of this kind which has come to our attention is to be found in *City of Mobile v. Yuille*, 3 Ala. 137. That was an ancient case where a power granted to the city of Mobile to license bakers and to regulate the weight and price of bread was sustained so far as regulating the weight of bread was concerned, no question being raised as to the right to regulate the price. Whenever the power of a state legislature to fix the price which shall be received by one for his property, when the same is not impressed with a public interest, has had the attention of American courts, the expressions have been uniformly to the effect that no such power exists. Perhaps the strongest language to be found upon this subject is employed in the celebrated associated press case found in *State ex rel. v. Associated Press*, 159 Mo. 410, 438, 439, 441, where the following language of Judge Cooley is quoted with approval: "In the early days of the common law it was sometimes thought necessary, in order to prevent extortion, to interfere, by royal proclamation or otherwise, and establish the charges that might be exacted for certain commodities or services. The price of wages was oftener regulated than that of anything else, the local magistrates being generally allowed to exercise authority over the subject. The practice was followed in this country, and prevailed to some extent up to the time of independence. Since then it has been commonly supposed that a general power in the state to regulate prices was inconsistent with constitutional liberty." The Missouri court quotes from another eminent authority: "In other words, it was assumed to be a part of the natural and civil liberty guaranteed by American institutions to form business relations and to make contracts free from state interference, and this was thought to include the right of everyone to ask for his wares or services whatever price he was able to get and others were willing to pay." And

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upon this subject the court further says: "He would indeed be regarded as a bold innovator, if not a madman, who, keeping within the lines marked out in Munn's case, and following the premises there laid down, to their logical conclusion, should offer a bill establishing the maximum rates at which wheat, pork, etc., could be sold, or merchandise or wares of the shoemaker or the potter or the blacksmith."

Of course, strictly speaking, it may truthfully be said that the public have an interest in the price at which every commodity which is used by the public is sold but this general interest is not sufficient to confer upon the legislature the power to control or regulate the price of such commodities. "The mere fact that the public have an interest in the existence of the business and are accommodated by it cannot be sufficient for that would subject the stock of the merchant and his charges to public regulation. The public have an interest in every business in which an individual offers his wares, his merchandise, his services, or his accommodations to the public, but his offer does not place him at the mercy of the public in respect to charges and prices." Cooley's Const. Lim. p. 736. "The police power is broad in its scope but it is subject to the just limitation that it extends only to such measures as are reasonable in their application and which tend in some appreciable degree to promote, protect or preserve the public health, morals or safety or the general welfare. The prohibition of an act which the court can clearly see has no tendency to affect, injure or endanger the public in any of these particulars and which is entirely innocent in character is an act beyond the pale of this limitation and it is therefore not a legitimate exercise of police power." *Ex parte Quarg*, 84 Pac. 766; *People v. Steele*, 231 Ill. 340.

It is a matter of common knowledge that rice is grown

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in Hawaii in small quantities by numerous producers throughout the Territory and that the total output is small. There is no claim that the defendant or any other person enjoys a monopoly of this commodity and it must be conceded that if the legislature can properly control the price at which Hawaiian-grown rice may be sold it may with like authority regulate the prices of all other commodities, whether they be sugar, pineapples, clothing, groceries, hardware or other articles used or consumed by the public. And why then should not the contractor and the professional man be subject to this paternal legislation, and why may not the legislature fix the price and value of the services of the laborer? The law is clearly one of those enactments the danger of which was foreshadowed by the supreme court of California in *Ex parte Jentsch*, 112 Cal. 468, 473, where it said: "So while the police power is one whose proper use makes most potently for good in its undefined scope and inordinate exercise lurk no small danger to the republic. For the difficulty which is experienced in defining its just limits and bounds affords a temptation to the legislature to encroach upon the rights of citizens with experimental laws none the less dangerous because well meant." One of the incidents of the ownership of property is the right to sell and dispose of it. Where the right to sell is abridged, to the extent of the curtailment of that right is the owner deprived of his property. "The Constitution insures to every person liberty and the protection of his property rights, and provides that he shall not be deprived of life, liberty or property without due process of law. The liberty of the citizen includes the right to acquire property, to own and use it, to buy and sell it. It is a necessary incident to the ownership of property that the party shall have the right to sell or barter it and this right is protected by the Constitution as such an incident of ownership." *Chicago v.*

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*Netcher*, 48 L. R. A. 261; *Third National Bank v. Divine Grocery Co.*, 34 L. R. A. 445.

We doubt not that the legislature which enacted this law was inspired by the loftiest and most patriotic motives, but the evils flowing from the assumption of power to determine the compensation a man may receive for the use of his property have been ignored resulting in an invasion of the personal rights and liberties of the citizen guaranteed to him by the Federal Constitution. If the legislative enactment is to be held valid then there is no length to which legislative regulation may not extend. The prices of the wares of the butcher, the baker and the candlestick maker will all be rightful subjects of regulation. The government established by the great men who framed the Federal Constitution will be transformed and we shall have in its stead government paternalism carried to an extreme never heretofore contemplated. A doorway full of subtleties will be opened which we fear may lead to disastrous results. The rights of the citizen will be restricted and the powers of the government extended in a degree unknown in America since the adoption of the Constitution and unknown in England since the days of 'blind zeal and pious cruelty.' Individual industry and efforts will cease to be worth while.

We are unwilling to go beyond the doctrine laid down by the Supreme Court of the United States in the granger cases and we hold that it is unlawful to interfere with the privileges of the individual to seek and obtain such compensation as he can for his private property where he neither asks nor receives from the sovereign power any special right or immunity not given to or possessed by every other citizen and where he has not devoted his property to any public use so that the same becomes impressed with a public interest within the meaning of the law. The objects of the territorial statute, in so far as the same at-

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tempts to protect the community against unreasonable, discriminatory or unfair prices of food, are fully accomplished by the Federal Food Control Act by which, under the war-power of Congress, all those engaged in the business of distributing (including buying and selling) rice and other commodities are subject to a presidential license which may be revoked if unreasonable, discriminatory or unfair prices are exacted and subjecting any offending party to severe punishment at the hands of the Federal government.

The third question propounded in the reserved questions submitted by the circuit court is answered in the affirmative. This conclusion necessarily results in a disposition of the case favorably to defendant and we deem it unnecessary to pass upon the other reserved questions and therefore return the same unanswered.

*O. H. Olson* and *A. M. Cristy*, First Deputy City and County Attorney (*A. M. Brown*, City and County Attorney and *R. B. Anderson* on the brief) for the Territory.

*E. C. Peters* for defendant.

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TERRITORY *v.* WILLIAM KEKIPI.

No. 1114.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

HON. W. H. HEEN, JUDGE.

ARGUED OCTOBER 25, 1918.

DECIDED NOVEMBER 4, 1918.

COKE, C. J., KEMP AND EDINGS, JJ.

EVIDENCE—objections—motion to strike out testimony.

One cannot take his chances of advantage by not objecting to questions which clearly call for improper evidence and if disappointed in the answer then move to strike out the testimony.

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**SAME—right of trial judge to ask questions.**

The trial judge should never assume the duties of counsel, but if at any time he becomes convinced that the witness has misunderstood the questions propounded by either counsel and as a result of such misunderstanding the import of his testimony is in doubt it is not only his privilege but his duty to ask such questions of the witness as are necessary to remove such doubt and fully develop the truth in the case.

**SAME—same.**

The trial judge should not in the examination of a witness intimate any opinion upon the facts, assume the prisoner's guilt, or use any expression calculated to prejudice the rights of either party.

**SAME—same—leading questions.**

It is not a valid objection that the court in examining a witness has asked a leading question. Since the court may in its discretion allow leading questions it may in the proper exercise of its right to ask questions also ask leading questions.

## OPINION OF THE COURT BY KEMP, J.

This cause comes to this court upon exceptions from the circuit court of the first judicial circuit. The defendant was convicted of the offense of keeping intoxicating liquor for sale without a license and fined \$1000. Various exceptions were noted during the trial, thirteen of which were embodied in a bill of exceptions and brought here for review. The defendant, however, in his oral argument abandoned and withdrew all of his exceptions except those relating to the action of the court in interrogating witnesses during the course of the trial. We will therefore consider only those exceptions which complain of the action of the court in propounding questions to the witnesses and will not examine the exceptions seriatim but will treat them in a general way.

The principal exception relied upon by the defendant relates to the refusal of the court to grant his motion to strike

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out the questions propounded by the court to the witness William Haupu and his answers thereto for the following reasons set forth in the motion :

“1. That the court went beyond its province and duty in asking said questions.

“2. That on account of said questions, it assumes the prisoner's guilt.

“3. That the court's intimations through said questions are likely to influence the jurors, and to defer to them in rendering their verdict.

“4. That the said questions would give to the jury the impression that the court has determined that the accused is guilty.

“5. That said questions asked by the court would tend to prejudice the accused.

“6. That some of the questions put by the court were leading and therefore improper as being contrary to the rules of evidence.”

A transcript of the questions and answers which the defendant desired stricken was attached to the motion.

It sometimes happens that answers are made to questions unobjectionable in themselves and improper testimony volunteered to which there was no opportunity to object in advance. In such a case the proper remedy is to move promptly to strike out the objectionable testimony. But one cannot take his chances of advantage by not objecting to questions which clearly call for improper evidence and if disappointed in the answers then move to strike out the testimony thus elicited. Jones' The Law of Evidence, Vol. 3, Sec. 898.

From an examination of the record we find no objection interposed to the examination of the witness by the court or to any of the questions propounded by the court. The motion to strike out the testimony was the first objection to this procedure and came on the following day of the trial, after the witness had been dismissed from the stand. If the objections now urged that the court had no right



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to examine the witness at all and that some of its questions were leading and some assumed the guilt of the accused are valid the defendant could and should have interposed his objection at the time the questions were asked and before they were answered instead of taking his chance of gaining an advantage and when no advantage materialized then moving to strike out the testimony. But even had the objections now urged been interposed at the proper time we would not be inclined to hold that reversible error was committed.

Before the interrogation of the witness by the court began evidence had been adduced which showed that the defendant occupied rooms in a tenement at Kamanuwai lane and Beretania street at which place the prosecution was seeking to show that he kept beer for sale. Part of the testimony of the witness Haupū was to the effect that he (the witness) had purchased various quantities of beer for the defendant at various times and had delivered it to defendant at his said rooms. Either because the witness did not understand the import of the questions asked by defendant's counsel on cross-examination or because the interpreter, with whom the court and counsel had difficulty, did not efficiently perform his duties or because the witness was not attempting to tell the truth, at the time the court began the examination of the witness which elicited the evidence which the defendant sought to have stricken, it was impossible to tell what the witness was claiming as to the quantity of beer he had purchased for defendant. In order to satisfy himself whether or not the witness understood the questions to which he had answered the court asked the witness a series of short and simple questions, some of which were leading, covering the same subject upon which both the prosecution and defense had examined him, the subject being the time and place of the various purchases of beer by the

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witness for the defendant and the quantity purchased on each occasion.

In ruling upon defendant's motion to strike the evidence thus elicited the trial judge said that he believed the witness had not understood counsel's questions and we infer that to be the reason he repeated the examination. The trial judge should never assume the duties of counsel, but if he at any time becomes convinced that the witness has misunderstood the questions propounded by either counsel and as a result of such misunderstanding the import of his testimony is in doubt, it is not only his privilege but his duty to ask such questions of the witness as are necessary to remove such doubt and fully develop the truth in the case. Of course he should not intimate any opinion upon the facts, assume the prisoner's guilt, or use any expression calculated to prejudice the rights of either party.

We think that the interrogation of the witness Haupu by the court in this case was justified by the fact that the purport of his testimony would otherwise have been left in doubt; that he did not by his questions either intimate an opinion upon the facts, assume the prisoner's guilt or use any expression calculated to prejudice defendant's right. Neither was it a valid objection to such examination that some of the questions were leading. The court may in its discretion allow counsel to ask leading questions and may as a matter of course, in the proper exercise of its right to ask questions, also ask leading questions. In support of our conclusions we extract the following:

"It is not only the right but the duty of the presiding judge in the trial of an action to ask questions of the witnesses whenever necessary to bring out the full truth of the case; but in so doing he should not himself intimate any opinion upon the facts, or use any expression calculated to prejudice the rights of either party." *Bowden et al v. Achor*, 22 S. E. (Ga.) 254.

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"The court has the right to submit questions to a witness, and, unless the questions are in themselves objectionable, or so asked as to improperly influence the jury, no error is committed. The court would not, of course, be warranted in assuming the duties of counsel, but has a right when the testimony of a witness is not clearly understood or when for the purpose of ruling intelligently upon a question, an explanation is needed, or a fuller answer required, to ask questions of the witness." *Colee v. The State*, 75 Ind. 511, 514.

"We know of no limit to the right which belongs to the court, of interrogating witnesses, either in civil or criminal cases, especially the latter. The life or death of a man may hang upon the full development of the truth." *Epps v. The State*, 19 Ga. 102, 118.

"We understand the law to be that it is the duty of the judge, in the exercise of sound discretion, to elicit the evidence upon relevant and material points involved in the case." *DeFord et al v. Painter*, 41 Pac. (Okla.) 96, 104.

"On the trial of an indictment, the presiding judge may recall a witness and examine him to supply an omitted fact material either to the prosecution or defense." *State v. Lee*, 80 N. C. 483.

"The court may examine a witness after the parties have finished and may in its discretion allow a cross-examination thereupon." *Foreman v. Baldwin*, 24 Ill. 298.

"The court has the right, in directing the course of the proceedings, to propound questions without regard to objections." *State v. Caron et al.*, 118 La. 349, 42 So. 960.

"The court may, in its discretion, ask proper questions of witnesses for the purpose of eliciting the truth; and it is not only proper but conditions arise sometimes wherein it becomes its absolute duty to do so. A court should never assume the attitude of a prosecutor, nor should it indicate to the jury by its manner or the form of its questions what it thinks of the merits of the case on trial; but a case will not be reversed on this ground except where there has been a clear abuse of the discretion." *Miller v. Territory*, 85 Pac. (Okla.) 239.

"It has been held that where the examination of the defendant by counsel left the evidence indefinite and conflict-

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ing as to some points, the action of the court in subjecting him to a lengthy examination as to such points, but without opening up any new subject or putting questions in a prejudicial form, did not call for a new trial, although it was not to be commended." 40 Cyc. 2441; *People v. Hackett*, 175 N. Y. 503, 67 N. E. 1087.

"It being in the discretion of the court to permit leading questions, it may of its own motion, ask questions of witnesses in that form." *People v. Bowers*, 18 Pac. (Cal.) 660.

"The court, upon a jury trial, may put proper questions to witnesses, even leading questions." *Huffman v. Cauble*, 86 Ind. 591.

"It is allowable for a trial judge in a criminal case, to ask a witness whether a conversation testified to as having taken place in his presence could have gone on without his hearing it though such question is leading in its character." *Driscoll v. People*, 47 Mich. 413, 11 N. W. 221.

What has been said in the discussion of the above exception and the authorities cited applies generally to the other exceptions, besides several of the other exceptions are based upon objections which do not contain any specific ground of objection.

"It is a familiar rule that mere general objections, without the statement of any specific ground of objection, will not be reviewed in the appellate court or constitute ground for a new trial. It is only fair that the trial judge should have opportunity to pass upon the precise question involved, and that the nature of the objection should be pointed out; and also that the opposing counsel should have the opportunity to remove the objection or supply the defect by other testimony." Jones' *The Law of Evidence*, Vol. 3, Sec. 896.

Such of the exceptions as are based upon objections which stated the specific ground of objection have been examined and we fail to find in them or any of them such error as would constitute grounds for reversal. They all

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fall within the principles announced in the discussion of the principal exception.

The exceptions are overruled.

*G. A. Davis* (*A. M. Brown*, City and County Attorney, on the brief), for the Territory.

*W. C. Achi, Sr.* (*Achi & Achi* on the brief), for defendant.

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IN THE MATTER OF THE PETITION OF MARY H.  
ATCHERLEY.

No. 1130.

MOTION TO DISMISS.

ARGUED OCTOBER 28, 1918.

DECIDED NOVEMBER 7, 1918.

COKE, C. J., KEMP, J., AND CIRCUIT JUDGE DEBOLT  
IN PLACE OF EDINGS, J., DISQUALIFIED.

APPEAL AND ERROR.

Exceptions do not lie to this court from the refusal of the judge of the land court to frame issues of fact for submission to a jury.

OPINION OF THE COURT BY COKE, C. J.

The petitioner, appellant, filed in the land court of the Territory her petition for the registration of certain land situated in Honuakaha, City and County of Honolulu. Answers were interposed by Lewers & Cooke, Ltd., and Kapiolani Estate, Ltd., denying the petitioner's ownership of the land in question or of any part thereof and setting up title thereto in said Lewers & Cooke, Ltd. Thereafter the land court entered a decree holding that the petitioner had no title to the premises and ordering that the petition be denied and dismissed. The petitioner undertook to perfect an appeal to the circuit court, sitting

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with a jury, under the provisions of section 3145 of the Revised Laws. She gave notice of appeal, paid the accrued costs and filed a bond for costs further to accrue. Thereafter she presented to the judge of the land court a petition for framing of issues required by the section of the Revised Laws just cited. The judge of the land court disallowed the suggested issues of fact in language as follows: "The said petition is hereby denied for the reason that the facts set forth are immaterial or are facts which were uncontested and uncontroverted at the trial of this case." The petitioner then presented to the judge of the land court a proposed bill of exceptions based upon the action of the judge of the land court in disallowing the petition containing the proposed issues of fact, which bill of exceptions was thereafter duly and regularly settled and allowed by the judge of the land court. The cause now comes before this court upon the bill of exceptions herein referred to.

The respondents, Lewers & Cooke, Ltd., and Kapiolani Estate, Ltd., have interposed a motion to dismiss the appeal by way of exceptions upon the following grounds:

"First: Because this court has no jurisdiction of the so called appeal or appeal by way of exception.

"Second: Because no appeal was taken in the land court within five days from the order or decision, judgment or decree of the court below to which exception was taken, or at all.

"Third: Because Chapter 178 of the Revised Laws of Hawaii, 1915, in reference to land registration, does not provide and there is no provision of law for taking exception to any opinion, direction, instruction, ruling or order of the judge of the circuit court, and the only way in which the same can be brought to this court is by appeal, and that the same cannot be brought to this court by bill of exceptions as sought in this case."

With this motion we are now concerned.

It is to be noted that although the petitioner endeavored to perfect an appeal from the land court to the circuit

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court upon the proposed issues to be tried by a jury the cause at no time reached the circuit court due to the refusal of the judge of the land court to frame issues of fact, one of the steps essential to remove the case from the land court to the circuit court. This being true it is only for us to decide whether exceptions to this court lie from an order or decree of the judge of the land court. We can find nothing in the Revised Laws which warrants such a procedure. This court has heretofore held that "A proceeding to bring land under the operation of the law providing for the registration of title is of the nature of a suit in equity and the rules of equitable procedure generally apply." *In re title of Pa Pelekane*, 21 Haw. 175, 178. Of course exceptions from decrees of courts of equity do not lie to this court. See *Mutch v. Holau*, 5 Haw. 314; *Un Wo Sang Co. v. Alo*, 7 Haw. 673. Appellate procedure in Massachusetts is similar to our own and the supreme court of that State has at various times passed upon the question now presented to us. In *Brooks v. Tarbell*, 103 Mass. 496, the court said: "The decree of a judge on the subject of framing issues to a jury is subject to the right of appeal but it has never been subject to exception." In *Ogden v. Greenleaf*, 143 Mass. 349, it was held that "An order of a justice of this court on a probate appeal declining to allow an amendment to an issue of fact framed for the jury cannot be revised by bill of exceptions but only by appeal." See also *Stockbridge Iron Co. v. Hudson Iron Co.*, 102 Mass. 45.

There is regrettable confusion and uncertainty in our laws relating to appellate procedure in this and other respects which might well have the attention of our lawmakers. See *Kealoha v. Halawa Plantation*, ante p. 436.

The motion is granted and the exceptions dismissed.

*D. L. Withington* for the motion.

*C. H. McBride* contra.

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CHARLES A. REYNOLDS *v.* ROSE S. REYNOLDS  
AND C. W. ASHFORD, FIRST JUDGE OF THE  
CIRCUIT COURT OF THE FIRST JUDICIAL CIR-  
CUIT, TERRITORY OF HAWAII.

No. 1133.

## PETITION FOR WRIT OF PROHIBITION.

ARGUED OCTOBER 31, 1918.

DECIDED NOVEMBER 12, 1918.

COKE, C. J., KEMP AND EDINGS, JJ.

**EQUITY—*appeal.***

In an equity suit by a wife against her husband for separate maintenance an order issued compelling the husband to support his wife *pendente lite* is appealable.

**SAME—*same.***

A provision inserted in such an order defining it as temporary and subject to change or modification in the discretion of the judge does not convert it into an interlocutory order nor alter its status as final and appealable.

**APPEAL—*effect upon contempt proceedings—prohibition.***

The circuit judge is without jurisdiction to enforce such an order by contempt proceedings when an appeal has been taken and pending such an appeal a writ of prohibition will lie to prevent its enforcement by contempt proceedings.

**SAME—*summary proceedings—prohibition.***

The rule that the writ of prohibition will not be granted unless the question of jurisdiction has been unsuccessfully raised in the lower court does not apply to summary proceedings of a quasi criminal nature such as proceedings for contempt.

OPINION OF THE COURT BY KEMP, J.

This is a petition by Charles A. Reynolds for a writ of prohibition against his wife, Rose S. Reynolds, and the Hon. C. W. Ashford, circuit judge.



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Rose S. Reynolds brought a bill in equity, in her own name without the intervention of a next friend, against her husband, Charles A. Reynolds, for separate maintenance. The suit was brought in the circuit court, first judicial circuit. Hon. C. W. Ashford being the circuit judge to whom equity matters are assigned, all proceedings in the matter were properly before him. Summons was issued and served and at the same time an order to show cause why temporary support and suit money should not be allowed the wife was served. The husband interposed a demurrer to the bill in which he set up and relied upon the ground that the petitioner, Rose S. Reynolds, being his wife, could not maintain the suit in her own name. The demurrer was overruled. Thereupon the husband filed his verified return to the order to show cause. The judge held that his verified return set up no facts which would excuse him from supporting his wife *pendente lite*, and, without further hearing, ordered that "Chas. A. Reynolds do, and he is hereby ordered to pay to the said Rose S. Reynolds the sum of sixty dollars (\$60.00) per month for her support, said payments to be made thirty (\$30.00) dollars on the first of each and every month and thirty (\$30.00) dollars on the succeeding 15th day of said month until final order or decree is issued in this cause and that the said payment so ordered shall commence with October 1st, A. D. 1918. This order to be temporary and subject to change or modification upon proper proceedings therefor in the discretion of the judge." The above order was made and entered October 2, 1918. On the following day, October 3, 1918, the husband filed and perfected an appeal from said order and did not make the initial payment of \$30 as he was therein ordered to do.

On October 4, 1918, on motion of the wife, the Hon. C. W. Ashford, the judge before whom the matter was pending, issued an order to said Charles A. Reynolds to

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appear before him at his chambers on the 7th day of October, 1918, to show cause why he should not be punished for contempt for failure to comply with the said order of October 2, 1918, whereupon the said Charles A. Reynolds sued out this writ of prohibition to restrain the said Rose S. Reynolds and the said circuit judge from taking any further proceedings in said suit in equity and from taking any further action in the contempt proceedings looking to the punishment of said Charles A. Reynolds for failing to make the payments specified in said order for temporary maintenance dated October 2, 1918, pending a final determination of his appeal from said order.

The circuit judge filed a statement in which he says that he has no answer to make to the writ, and submits himself to such order or decree as this court may make in the premises.

The wife made her return and said among other things that the order of October 2, 1918, commanding her said husband to pay her certain sums of money for her temporary support is in no sense final but purely interlocutory and not appealable. This constitutes her principal defense to the issuance of the writ.

The husband admits that the suit for separate maintenance by the wife against the husband is cognizable in a chancery court but contends that she must sue by her next friend and not in her own name. This and the sufficiency of the return to the order to show cause are the principal questions involved in the appeal of the husband from the order of October 2, 1918, and while counsel have devoted considerable space in their briefs to these questions we do not consider them material to a determination of this case.

The correctness of the court's ruling in overruling the demurrer to the bill and in holding that the return to the order to show cause did not show facts sufficient to constitute a defense are matters that will be considered upon a

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hearing of the appeal from the order allowing temporary maintenance and have no place in this proceeding. If the order allowing temporary maintenance is appealable and an appeal has in fact been perfected the appeal operates as a stay of all further proceedings thereunder pending said appeal and this writ should be perpetuated unless some other defect in the proceedings is found.

Counsel attempts to distinguish the order appealed from in this case from the order appealed from in *Dole v. Gear*, reported in 14 Haw. 554. His contention is that the order for temporary maintenance involved in this case, from which the appeal was taken, is made interlocutory, if not already so, by the recital therein that it is "temporary and subject to change or modification upon proper proceedings therefor in the discretion of the judge" and is therefore not appealable.

We think, however, that it is clear that the judge would have had the right to change or modify the order at any time during the pendency of said cause in the absence of the recital quoted and that this recital in no way distinguishes it from the order in the case of *Dole v. Gear*.

Counsel makes the further contention that as a prerequisite to the husband's right to apply for a writ of prohibition he would have to make a response to the order to show cause in the contempt proceedings and set up the fact that an appeal from the order in question had been taken as a defense to the contempt proceeding. In other words, he contends that the jurisdiction of the lower court to proceed must be challenged without success before the extraordinary writ of prohibition will lie. No authority has been cited in support of this proposition. We have no doubt that this contention is a correct statement of the general rule (32 Cyc. 624) but we do not think that it applies in summary proceedings of a quasi criminal character, such as proceedings for contempt where a fine may be imposed

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or the party imprisoned before the writ could be applied for. *Dole v. Gear, supra.*

Counsel has also argued that as the order of the court was that payments shall commence with October 1, 1918, and the appeal was not taken until October 3, 1918, the husband was already in contempt for failure to comply with the order before his appeal was taken and that therefore his appeal came too late. It will be observed that the order was not entered until October 2, 1918, and while it does provide that said payments "shall commence with October 1, A. D. 1918," we think that the intention of the order is to fix the time from which the husband should support the wife and was not intended as the date upon which the initial payment should be due. If it were otherwise the payment was ordered to be made upon an impossible date. The order fixes no date in the future when the initial payment should be made. The appeal was perfected before steps were taken to enforce its collection and within the statutory time. We find no merit in counsel's contention.

The one other question for our determination is, is the order of October 2, 1918, for temporary maintenance, appealable? This depends upon whether it is final or interlocutory. If it is interlocutory it is appealable only with the consent of the circuit judge and he has not given his consent in this case. If it is final an appeal lies as a matter of right. The decisions as to the appealability of such an order are by no means unanimous. In the case of *Dole v. Gear* the decisions holding such an order not appealable are discussed and in that opinion it is said that two reasons are given in support of such rulings—one, that the decree is interlocutory, the other, that the statutory provision for temporary alimony, designed as it is to meet an immediate need, indicates a legislative intent that the general statute relating to appeals should not apply. The opinion continues:

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"The answer to the first of these reasons is that the decree or order is final in its nature, though it is not the last decree in the case or even the decree that determines the merits of the main case. It is independent of the main case in that the final decree in the main case cannot affect it and that it in no way depends on the ultimate result or the merits of the main case. It is a money decree enforceable immediately by execution or other process and the effect of which is to divest the husband of his property. The answers given to the other reason are that, although the provision for temporary alimony is designed to supply immediate needs, the allowance of an appeal would at most merely delay the litigation until the propriety of the order for temporary alimony could be determined by the appellate court, and that the temporary inconvenience of the wife is not a sufficient reason for withholding from the husband a legal right. We may add that the argument against appealability in so far as it rests on the legislative intention assumed to be manifested by statutory provisions for temporary alimony in divorce and separation statutes, have no application to this case for the reason that here the alimony is granted under the general equity powers of the court and not under any statute. Accordingly, orders for temporary alimony, even when made in pursuance of statutes, are held appealable by the great majority of courts, the question having been considered at length in many of the cases. *McKennon v. McKennon*, 10 Okl. 400; *Blake v. Blake*, 80 Ill. 523; *State v. Seddon*, 93 Mo. 520; *Daniels v. Daniels*, 9 Colo. 133; *Sharon v. Sharon*, 67 Cal. 185; *In re Finkelstein*, 34 Pac. (Mont.) 847; *Gruhl v. Gruhl*, 123 Ind. 86; *Leslie v. Leslie*, 6 Abb. Pr. N. S. 193; *Blair v. Blair*, 74 Ia. 311; *Williams v. Williams*, 29 Wis. 517, and other cases, in the same and other states, cited in these cases. In our opinion the order is a final one for the purposes of appeal under the statute and we cannot make law by creating an exception to the statute" (pp. 566, 567).

Counsel for the wife virtually admits that if the decision in the case of *Dole v. Gear*, *supra*, is approved the order is final and appealable and that if his other contentions are

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overruled the writ properly issued and should be perpetuated. But he urges us to overrule that part of that decision which holds an order for temporary maintenance to be a final order and appealable. We are asked to adopt the dissenting opinion as containing the better reasoning. In that opinion it is said that the majority opinion and the cases cited in support of it "overlook the very important point that the statute, and the common law in the absence of statute, imposes the duty on the husband, by reason of the marriage relation, when he has turned his wife adrift and without fault on her part compels her to live separate and apart from him, to supply her with necessaries, and if he fails to do this and she is compelled to sue for them in the courts then he is liable for her reasonable counsel fees. These are 'legal rights' conferred on the wronged wife by law. Temporary support is allowable to meet the 'immediate necessities of the wife' (*Call v. Call*, 65 Me. 407). It seems to me that these rights given the wife are equally sacred and entitled to the protection of the courts with the property rights of the husband and should not be permitted to be frittered away by appeal. The circuit judge in making the order merely announced the judgment of the law on the facts" (p. 571). We think, however, that the dissenting opinion ignores the real issue that is presented to a court when it is asked to allow temporary maintenance for a wife. When the husband in response to the order to show cause sets up as his defense the misconduct of his wife as his reason for not supporting her and for his not living with her the truth as to this becomes a controlling issue. If the husband succeeds in showing that the fault lies with the wife he will not be compelled to support her even temporarily. (*Mackintosh v. Mackintosh*, 60 N. Y. S. 679; *Ballentine v. Ballentine*, 5 N. J. E. 471, 476; *Dougherty v. Dougherty*, 8 N. J. E. 540; *Martin v. Martin*, 8 N. J. E. 563, 569.) If it were other-

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wise it would be idle to issue an order to show cause. If the law fixes his liability absolutely for support *pendente lite* without regard to where the fault lies the judge before whom the action is brought would, instead of issuing his order to show cause, merely order the temporary support money paid over without a hearing.

The question of whether or not the husband shall be compelled to support the wife *pendente lite* being dependent upon a determination of which spouse is at fault, an allowance of temporary maintenance, if made in a case in which it should afterwards appear that the wife was the one at fault, would be an invasion of the husband's property rights for which he would have no redress unless allowed to appeal from the temporary order and withhold payments pending his appeal.

We think that it was correctly decided in *Dole v. Gear* that an order for temporary maintenance is a final order within the meaning of the law of appeals. The order in this case not being distinguishable from the order in that case is also final and appealable. An appeal having in fact been perfected the circuit judge had no further jurisdiction in the matter pending the appeal, and the writ should be made absolute as to further proceedings in the contempt matter.

We see no reason, however, why we should prohibit further proceedings in the main case. It is true that one of the questions which will be settled by the appeal from the order is a vital question in the main case as well. We refer to the question of the right of the wife to maintain the suit in her own name without the intervention of a next friend. However, no appeal was taken from the order overruling the demurrer which raised that question and we think that no showing is made which would entitle petitioner to have the writ perpetuated as to the main case.

In compliance with what has been said the writ will be

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made absolute as to further proceedings in the contempt matter pending the appeal from the order allowing temporary maintenance but will be dissolved as to further proceedings in the main case.

*J. W. Cathcart* and *R. A. Vitousek* (*Thompson & Cathcart* on the brief) for petitioner.

*C. C. Bitting* for respondent *Rose S. Reynolds*.

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HANNAH MAKAINAI *v.* SOLOMON K. LALAKEA,  
ET AL.

Nos. 1115 and 1125.

MOTIONS TO DISMISS.

ARGUED NOVEMBER 12, 1918.

DECIDED NOVEMBER 18, 1918.

COKE, C. J., KEMP AND EDINGS, JJ.

EQUITY—*appeal*.

The filing of a written decision sustaining a demurrer to a bill of complaint in an equity case is not a final decision within the meaning of the law of appeals and an appeal does not lie therefrom. The appeal must be taken from the decree and not from the decision.

SAME—*same—filing of appeal*.

A notice of appeal from a decision in an equity case filed before the entry of the decree will not be ordered by this court filed as of the day of the entry of the decree.

SAME—*same—time of filing notice of appeal*.

R. L. Sec. 2508 provides that notice of appeal shall be filed within five days after the filing of the decision, judgment, order or decree appealed from. A notice of appeal not filed within the statutory time is invalid and upon motion will be dismissed.

OPINION OF THE COURT BY KEMP, J.

This case, a bill in equity, was pending before the judge



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of the fourth judicial circuit. A demurrer to the bill of complaint was interposed and on June 14 the judge rendered a written decision sustaining the demurrer. On June 17 the complainant filed a notice of appeal and appeal from "that certain decision sustaining demurrer filed in the above entitled court and cause, on the 14th day of June, 1918" and duly perfected said appeal. Thereafter on July 25 a formal decree sustaining the demurrer and dismissing the bill of complaint was filed and on July 31 the complainant filed a notice of appeal and appeal from "that certain decree, sustaining demurrer filed in the above entitled court and cause, on the 25th day of July, 1918" and duly perfected said appeal.

The respondent has interposed a motion in each of said appeals seeking a dismissal thereof, the first on the ground that the appeal is from the decision and not from the decree, and the second on the ground that the notice of appeal was not filed within five days after the filing of the decree and it is upon these motions that the case is now before us.

In support of his motion in the first case the respondent has cited *Un Wo Sang Co. v. Alo*, 7 Haw. 673, and relies upon it as the leading and pioneer case in this jurisdiction upon the question here involved. In that case, a proceeding on a bill in equity, in ruling upon a demurrer to the bill, the judge filed a written decision concluding with the words "and therefore the bill must be dismissed." Notice of appeal was filed. The notice was that plaintiffs "appeal from the decree herein made dismissing their bill of complaint." The further steps necessary to perfect an appeal were taken. Thereafter a formal decree was entered concluding with "it is ordered, adjudged and decreed that the plaintiffs' said bill of complaint be and the same is hereby dismissed with costs to the defendant to be taxed." In that case the contention of the appellant was

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that the decision, so-called, was a decree or equivalent to a decree and a sufficient disposition of the case if no further decree or decision had been filed to be pleadable in bar of another bill setting forth the matters so decided and that as a decided case, an appeal might be taken from the decision. In discussing this contention of the appellant the court said: "The force of this claim lies chiefly in the approximation, in this case, of what is expressed in the conclusion of the opinion to what is set forth in the decree. But while there is approximation, the expression in the opinion does not comprehend, in important particulars, what is pronounced in the decree. The opinion expressed the conclusion that the bill must be dismissed; the decree orders, adjudges and decrees it to be dismissed and ordains that the plaintiff shall pay the defendant his costs, to be taxed. But it is unnecessary to remark upon the well known differences between the statement of the opinion and legal reasoning of the court, the order or decree which is the judgment of the court and an authoritative portion of the record. \* \* \* We hold that the statute, Section 859, which gives an appeal 'from any decision, judgment, order or decree made by any justice at chambers,' to be taken within ten days, by Rule 4, is to be construed to intend an appeal from the decree in cases where by the practice of courts a decree is required to be made. The term decision imports nothing else than decree, judgment or order. With whatever laxity the word decision may be used by applying it to opinions of the court, its meaning in reference to appeal proceedings is synonymous with the other terms with which it is joined in the statute" (pp. 674, 675).

The decision in the case at bar does not contain language which approximates the language used in the decree. In the decision, the judge after setting forth his views at length on the question raised by the demurrer

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concludes with "I am of the opinion that the demurrer should be sustained and it is so ordered."

In this case, as in the case from which we have just quoted, a decree was entered after the appeal had been perfected, in that case purporting to be from the decree but in this case purporting to be from the decision, and in the decree in this case it is "ordered and decreed that the demurrer to the said second amended bill of complaint be and the same is hereby sustained and that said second amended bill of complaint be and the same is hereby dismissed, and that the petitioner pay the costs of this court in the sum of \$39.00."

We think it is clear, and we hold, that the rendition of the decision by the judge was not a conclusion of the matter before him and that the petitioner at any time before the entry of the decree dismissing her bill might have procured permission from the judge to further amend her bill of complaint. It was therefore not a final decision within the meaning of the law of appeals and an appeal does not lie therefrom. The appeal must be taken from the decree and not from the decision. *Mutch v. Holau*, 5 Haw. 314; *In re estate of Walters*, 10 Haw. 25; *Barthrop v. Kona Coffee Co.*, 10 Haw. 398; *Kahai v. Kuhia*, 11 Haw. 3; *Tax Assessor v. Makee Sugar Co.*, 18 Haw. 267.

However, in the case of *Un Wo Sang Co. v. Alo*, notwithstanding the court's holding that the appeal was premature, in view of the fact that the notice of appeal was on file when the decree was entered, the appeal was ordered entered as of the day of the entry of the decree and the motion to dismiss the appeal was denied.

Counsel for complainant insists that, if we should hold that her appeal should have been taken from the decree instead of from the decision, we should then order her appeal entered as of the date of the entry of the decree and deny the motion to dismiss. It seems to us that the

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rules governing the entry of decrees, judgments and orders *nunc pro tunc* can have no application to this case, though the court in the case referred to seems to have relied upon those rules as justifying its action in that case. The term *nunc pro tunc* signifies or means "now for then" or that a thing is done now that shall have the same legal force and effect as if done at the time it ought to have been done. The doctrine seems to apply to delays of the court and not to premature actions of the parties. Where through no fault of the complaining party some act which the court must perform is not done at the time it ought to be done, the court, in the interest of justice, may and should presently do or perform that act as of the date it should have been done (Words & Phrases, Vol. 5; Freeman on Judgments, 3 ed., Sec. 56).

But even if the facts before us are such as warrant the application of the rules governing the entry of decrees *nunc pro tunc* yet the complainant has not brought herself within those rules. Before one has the right to invoke the exercise of this power it should be made to appear affirmatively that the delay was occasioned either by the court or the opposite party and not by the complaining party. But that is not this case. It does not appear that the judge or the respondent was in any way to blame for complainant filing her notice of appeal and appeal prior to the entry of the decree, or for the decree not having been filed immediately after the filing of the decision. It was within her power to seasonably prepare and present for signing and filing a proper draft of decree carrying out the findings of the judge expressed in his decision. *Sumner v. Gear*, 20 Haw. 219, 221.

It will also be seen that if we were to grant the complainant's request that this notice of appeal be ordered filed as of the day of the entry of the decree we would still be confronted with the fact that it does not purport

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to be an appeal from the decree but purports to be an appeal from the decision and complainant would be in no better position than she now is.

In so far as the case of *Un Wo Sang v. Alo, supra*, may be considered authority for the action we are asked to take in ordering the refileing of the notice we decline to follow it.

In the second case the motion to dismiss is based upon the ground that the notice of appeal was not filed within five days after the filing of the decree.

Our statute provides that "Appeals shall be allowed from all decisions, judgments, orders or decrees of circuit judges in chambers, to the supreme court \* \* \* whenever the party appealing shall file notice of his appeal within five days, and shall pay the costs accrued, and deposit a sufficient bond in the sum of fifty dollars, conditioned for the payment of the costs further to accrue in case he is defeated in the appellate court, or money to the same amount, within ten days after the filing of the decision, judgment, order or decree appealed from" (R. L. Sec. 2508).

The record before us only shows inferentially when the decree and notice of appeal therefrom were filed. The clerk of the circuit court has failed to include as part of the various instruments comprising the record the endorsements thereon. In this he was derelict in his duty. But for the recital in complainant's notice of appeal that the decree was filed on July 25, and the date of the execution of her notice of appeal as July 31, together with the statement of respondent's counsel and apparently acquiesced in by complainant's counsel, we would not be in position to pass upon this motion. In the future the clerk should be more thorough in the preparation of records on appeal. However, assuming that the decree in this case was filed upon July 25 and the notice of appeal therefrom was filed

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on July 31, more than five days elapsed between the filing of the decree and the filing of the notice of appeal therefrom. A notice of appeal not filed within the statutory time is invalid and upon motion of appellee will be dismissed.

Both motions should be granted and the appeals dismissed and it is so ordered.

*W. H. Smith* for the motions.

*J. Lightfoot* contra.

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L. L. McCANDLESS v. CITY AND COUNTY OF HONOLULU, BY A. M. BROWN, CITY AND COUNTY ATTORNEY, AND D. L. CONKLING, ITS TREASURER.

No. 1090.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

HON. S. B. KEMP, JUDGE.

ARGUED OCTOBER 22, 1918.

DECIDED NOVEMBER 19, 1918.

COKE, C. J., EDINGS, J., AND CIRCUIT JUDGE HEEN IN PLACE OF KEMP, J., DISQUALIFIED.

MUNICIPAL CORPORATIONS—*eminent domain*.

The exercise of the power of assessment for the improvement of an existing street is by virtue of the taxing power and not of the law of eminent domain.

SAME—*same*—*constitutional law*.

The right to take private property for taxes is distinguished from the eminent domain and is not repugnant to the Fifth Amendment of the Federal Constitution.

SAME—*same*—*same*—"due process of law."

An assessment for local improvement based upon frontage is

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not in conflict with the "due process of law" clause of the Constitution.

SAME—*same—same—same.*

A party is not deprived of his property without due process of law by the enforced collection of taxes merely, because they, in individual cases, impose unequal burdens.

SAME—*frontage tax—special benefits.*

An ordinance providing that all the lots abutting upon the portion of the street to be improved shall be assessed in proportion as the frontage of each lot is to the frontage of all the lots in the district, does not contravene the law that assessments for local public improvement shall be in proportion to the benefit.

SAME—*same—protest.*

The word "owners" in section 1795 R. L. 1915, providing that owners might protest against local improvements, held not to include tenants or lessees prior to the passage of Act 239 Session Laws 1917.

SAME—*same—limitation of actions.*

The legislature has power to prescribe the time within which actions or proceedings at law or in equity to review, question the validity or enjoin the enforcement of any improvement ordinance shall be instituted.

SAME—*same—same.*

The thirty-day limitation within which actions or proceedings to review, question or enjoin the enforcement of a local improvement ordinance shall be brought commences to run from the last day of the publication of the assessment ordinance.

OPINION OF THE COURT BY EDINGS, J.

This matter comes up on appeal by the petitioner-appellant from a decree of the circuit judge sustaining respondents' demurrer to petitioner-appellant's bill for an injunction. A summarized statement of the case is as follows:

On October 5, 1917, petitioner-appellant filed his bill for an injunction in the circuit court of the first circuit of this Territory, in substance alleging that petitioner-appellant was at the times mentioned the owner in fee simple of cer-

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tain premises on Beretania street, in Honolulu, which said premises have a frontage of 72.5 feet on said Beretania street, and a depth narrowing as the depth increases as will appear by reference to Lot 37 as designated on the corrected map of frontage improvement district No. 5, dated October 17, 1916, marked exhibit "B" and made a part of said petition; that on July 8, 1916, the board of supervisors of the City and County of Honolulu passed a resolution, No. 556, wherein it was decided that Beretania street, from a point near King street to Nuuanu avenue, should be improved by the initiative of the board of supervisors and the cost thereof be assessed against the owners, per front foot, as the premises abutted upon said highway, declaring Beretania street a main thoroughfare, and stating that one-third of the cost of such improvement should be borne by the City and County of Honolulu; that on the 2d day of August, 1916, the city and county engineer filed his engineer's preliminary report showing among other facts that the total frontage of land abutting on said street was 4057.2 feet, that the total maximum cost was estimated to be \$33,077.50, and that one-third of the cost, to be paid by the City and County of Honolulu, would be \$10,980.80, and that the maximum rate charged against each front foot of abutting property would be \$5.413018, with curbing 300 feet at 45¢ a foot, that the maximum cost of the improvement, exclusive of \$2,500, estimated expenses of the engineer, to be paid by the City and County of Honolulu, would be \$30,577; that thereafter on said 2d day of August, 1916, such data so furnished was, by resolution, approved by the board of supervisors and a date set for a public hearing before said board, to-wit, August 29, 1916; that thereafter there was published a notice of hearing, which notice showed the general character of the proposed improvement and other details required by law including the notice that it was proposed to



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assess property abutting on said portion of Beretania street on a uniform front foot basis at a maximum of \$5.413018 per front foot plus a curbing assessment where necessary. It was also stated in said notice that this uniform rate was arrived at after deducting a general contribution by the City and County of one-third of the total cost; that the date fixed for said hearing was August 29, 1916; that the total frontage to be assessed was 4057.2 feet—of this 3051.4 feet were privately owned and 1005.8 feet were represented by property owned by the Territory; that the total abutting area subject to said assessment is 3051.4 feet, the same being owned by parties other than the Territory; that on August 29, 1916, protests against the proposed improvement were filed with the clerk of the City and County of Honolulu by the owners of more than 1775 front feet abutting on said Beretania street; that the said owners consisted of two classes—owners in fee simple representing 1001.4 front feet and owners of leasehold interests representing 774.2 front feet; that on October 25, 1916, by resolution No. 623, the said board of supervisors claims to have passed a resolution purporting to adopt, create, define and establish frontage improvement district No. 5, and defining the kind, extent and general detail of the proposed improvement, declaring that one-third of the entire cost was to be borne by the City and County of Honolulu and that the method of assessment was by frontage, and giving other detailed information of the work to be done; that on October 27, 1916, public notice was duly given that tenders to complete said contract on frontage improvement district No. 5 would be received on November 26, 1916, upon which date only one bid was received, which was in excess of the estimate and was rejected; that on December 12, 1916, the said engineer filed a modified report of such improvement, which modified report was, by resolution No. 665, approved, and the clerk

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of the board authorized to call for bids; that the said clerk duly advertised for bids to be received on January 3, 1917, upon which date one bid of \$30,500 was received; that on January 9, 1917, said board, by resolution No. 680, purported to accept said bid and directed a corrected map to be prepared by said engineer, showing in detail the proportionate amount per front foot to be assessed against the owners thereof, and a list of all known owners, lessees and occupants of land fronting upon said highway; that on January 15, 1917, said engineer filed a corrected map as directed; that on January 23, 1917, by resolution No. 699, the said board purported to ratify the said report of said assessment; that on February 2, 1917, the said board called a public hearing of property owners interested in the assessments, showing in the notice of said hearing that the actual rate of assessment would be \$5.404606 per front foot, at which hearing the board sat as a board of equalization to hear and receive complaints and objections respecting the method of apportionment and the several proposed assessments; that thereafter the said board passed an ordinance purporting to confirm the first proposed assessment, by ordinance No. 118, approved March 1, 1917; that by said ordinance the said board purported to fix the proportion of said cost to be assessed against the properties of the said frontage improvement district No. 5, and against the alleged owners respectively; that the tax assessor of the district of Honolulu claims to have given written notice by letter to and by listing upon the land assessed, of the several owners, of the several amounts due from each, and of the date when the same were payable, to-wit, thirty days from March 20, 1917; that petitioner as owner of 72.5 feet frontage is charged with an assessment of \$391.83; that he has refused to pay said assessment and claims the same to be illegal and void; that the map prepared by the said engineer does not show the metes and bounds of the

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property of petitioner, to-wit. Lot No. 37, but does show the correct frontage of the same and that the side lines of said lot are lines converging from the front towards the rear of the premises with indefinite and unknown depth and area as to said lot; that the front line does not bear a proportionate relation to the areas of the premises benefited as in the case of side lines of lots running at right angles with the front line; that other lots are greatly benefited in excess of the frontage of the proportion assessed against them compared with the premises of petitioner; that other lots belonging to parties other than petitioner are charged greatly in excess of their proportionate benefit from the said improvement; that as to petitioner and as to the owners of Lots 39, 40, 41, 1, 11, 12, 15, 16 and 18 the assessment is not in proportion to the benefit to the premises assessed, but is illegal, unfair and inequitable; that the sum of \$387.40 for the improvement of side streets leading into said Beretania street and the building of a retaining wall and grading of approaches from Kamanuwai Lane was included in said assessment and taxed *pro rata* against all the abutting owners on Beretania street, which assessment against petitioner is without benefit to his property abutting on Beretania street; that the treasurer has advertised for sale the said Lot 37 for the payment of said assessment and will sell the same unless restrained by the court, and the petitioner prays that the assessment against the said lot be set aside and that the treasurer be restrained from selling said lot, to which bill for an injunction the respondents filed an exceedingly voluminous demurrer, the salient and pertinent portions of which and those germane to this decision, summarized, are substantially as follows:

Section II. It affirmatively appears on the face of said complaint or petition and the exhibits thereto annexed or therein referred to that L. L. McCandless (petitioner-ap-

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pellant) is not entitled to equitable relief or to any relief in these proceedings by reason of the following facts therein appearing: Paragraph 2—It affirmatively appears that a hearing was duly given to all property owners and others interested on August 29, 1916. Paragraph 4—It affirmatively appears that owners representing but 1001.4 feet out of 4057.2 feet affected, or but 24.6% of the total frontage abutting upon said improvement, filed protests against said improvement at the public hearing of August 29, 1916. Paragraph 5—It affirmatively appears that protests representing 774.5 feet out of 4057.2 feet affected, or but 19% of the frontage abutting upon said improvement, were from lessees, whose interest in said improvement does not appear and whose protests in manner and form and substance as filed have no force and effect under any provision of law or statute. Paragraph 6—It affirmatively appears that the board of supervisors continued to have and did duly exercise jurisdiction according to law and the statutes on and after August 29, 1916. Paragraph 7—It affirmatively appears that after strict compliance with the statutes and after duly receiving bids for the work to be performed, the board of supervisors duly called and held a public hearing on February 6, 1917, as to the method, amount and apportionment of assessments, at which hearing petitioner failed to appear and at which hearing there were no appearances, protests, complaints or objections made or filed. Paragraph 8—It affirmatively appears that thereafter said board of supervisors “specially found and established that each and every parcel of land subject to assessment abutting upon said frontage improvement is or will be specially benefited by said improvement to the amount of the respective assessment therefor.” Paragraph 10—It affirmatively appears that petitioner and his attorneys were at all times fully notified and apprised of the actions of the board of supervisors and the other officers,

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agents and servants of the City and County of Honolulu. Paragraph 11—It affirmatively appears that said assessments were uniform by frontage, which method of apportionment was confirmed by the board of supervisors after two hearings and as to which method of apportionment no protest, complaint or objection was ever made or filed before said board.

Section XI. Said complaint or petition and the matters therein contained are barred by lapse of time by reason of section 1812 Revised Laws of Hawaii 1915 from any review in these proceedings.

The petitioner-appellant claims that the assessment should be declared void for the following reasons, which we shall consider in their order:

First. "That the assessment is void as in violation of the Fifth Amendment of the Federal Constitution in that it deprives a property owner of the equal protection of the laws, and deprives him of property without due process of law."

The Fifth Amendment to the Constitution guarantees that "No person shall \* \* \* be deprived of life, liberty or property without due process of law: nor shall private property be taken for public use without just compensation." The phrase "equal protection of the laws" occurs in the Fourteenth Amendment and not in the Fifth.

It has long been established that local assessments for street improvements are by virtue of the taxing power. This is conceded by the petitioner-appellant in his brief. "The exercise of the power of assessment after the paving of an existing street is an evidence of the taxing power and not of the law of eminent domain" (Brief, p. 7). "The controversy which existed over this point should be regarded as closed from a study of the cases" (ib. p. 7).

The provision in the Constitution of the United States that private property shall not be taken for public use

## Opinion of the Court.

without just compensation is the right of eminent domain, and this right which is denominated the eminent domain is distinguished from the right to take private property for taxes. *People v. Mayor, etc.*, 4 N. Y. 419, where the two rights are contrasted. And from assessments for local improvements: *Nichols v. City of Bridgeport*, 23 Conn. 189; *State v. Blake*, 36 N. J. L. 442; *Chambers v. Satterlee*, 40 Cal. 497. Therefore under this claim of the petitioner-appellant we will confine ourselves to the question of whether or not the assessment was created by "due process of law."

The legal import of the phrase "due process of law" is the same both in the Fifth and in the Fourteenth Amendments to the Constitution. In the case of *French v. Barber Asphalt Paving Co.*, 181 U. S. 324, the court says: "The courts are very generally agreed that the authority to require the property specially benefited to bear the expense of local improvements is a branch of the taxing power, or included within it. \* \* \* Whether the expense of making such improvement shall be paid out of the general treasury, or be assessed upon the abutting or other property specially benefited, and, if in the latter mode, whether the assessment shall be upon all property found to be benefited, or alone upon the abutters, according to frontage or according to the area of their lots, is according to the present weight of authority considered to be a question of legislative expediency. \* \* \* We can see in the determination reached possible sources of error and perhaps of injustice, but we are not at liberty to say that the tax on the property was imposed without reference to special benefits. \* \* \* It may be that the process by which the result was reached was not the best attainable, and that some other might have been more accurate and just, we cannot for that reason question an enactment within the general legislative power." In *Davidson v. New Orleans*, 96 U. S. 97, cited and approved in *French v. Barber A. P. Co.*, it was held that "neither the

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corporate agency by which the work is done, the excessive price which the statute allows therefor, nor the relative importance of the work to the value of the land assessed \* \* \* nor that the assessment is unequal as regards the benefits conferred, nor that personal judgments are rendered for the amount assessed, are matters in which the State authorities are controlled by the Federal Constitution."

From a review of the various cases upon the subject we hold that the assessment was not repugnant to or in conflict with the "due process of law" clause of the Fifth Amendment to the Constitution.

The second claim of petitioner-appellant is "that it (the assessment) is void because the assessment statute requires the assessment to be made according to benefits, whereas the assessment charges him in substantial excess of benefits."

This is a question of fact and we are unable to glean from the petition any evidence to support it. Exact equality of taxation is not always obtainable, and for that reason the excess of cost over special benefits, unless it be of a grossly inadequate character, ought not to be regarded by a court of equity when its aid is invoked to restrain the enforcement of a special assessment. And even when the assessment is grossly disproportionate to the benefits the objection must be made within the statutory time. *von Damm v. Conkling*, 23 Haw. 487.

The third contention of petitioner-appellant is that "The assessment is void because the protests filed were in excess of sixty per cent. of the frontage privately owned and therefore was barred by its own terms."

The petition alleges that of the total frontage to be assessed 3051.4 feet were privately owned; that on August 29, 1916, protests against the proposed improvement were filed by the owners of more than 1775 front feet; that the said



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owners consisted of two classes—owners in fee simple representing 1001.4 front feet and owners of leasehold interests representing 774.2 front feet.

Section 1795 R. L. 1915, as amended by Act 164 Session Laws of 1915, provides that “If the owners of fifty-five per cent. of the total frontage or area to be assessed for such improvements shall at the hearing or prior thereto file with the supervisors a written protest duly acknowledged by such owners against the making of such improvement or against any part of the plan therefor, the same shall not be made contrary to such protest. If the protest is against the making of any improvement, the same shall not be made, and the proceedings shall not be renewed within six months thereafter unless under the provisions of Section 1797 of this chapter.”

The petitioner-appellant contends that the word “owners” in the statute should be held to embrace and include lessees and tenants. This construction we do not regard as tenable or warrantable. There is not anything in the statute to indicate that the word “owners” was not used in its ordinary and familiar sense nor is there anything in the petition to show that any beneficial result would be achieved by placing a different interpretation upon it. “One who owns in fee” (*St. Paul & S. C. R. R. Co. v. Matthews*, 16 Minn. 303); “The person owning the fee” (*Page v. W. W. Chase Co.*, 145 Cal. 578-583); “A person who has an estate in fee simple” (*Bowen v. John*, 201 Ill. 292, 295). And it is reasonable to assume that this was the interpretation placed upon the word “owners” by the legislature of the Territory, for by Act 239 Session Laws of 1917, section 1795 of the Revised Laws of Hawaii is amended to read “Any lessee of any property to be assessed under this chapter, who by the express terms of his lease must pay the kind of assessments contemplated by this chapter shall be subrogated to all the rights of such owner to protest by filing with the board



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prior to or at the hearing a certified copy of his lease, together with a citation of the book and page of the public record of the same if it be recorded.”

The fourth claim of petitioner-appellant is “That the action of appellant was not barred by the thirty day statute of limitations.”

Section 1812 R. L. 1915 provides that “No action or proceeding at law or in equity to review any acts or proceedings or to question the validity or enjoin the performance of any act or the issue or payment of any bonds, or the levy or collection of any assessments authorized by sections 1793-1813, or for any other relief against any acts or proceedings, done or had under said sections, whether based upon irregularities or jurisdictional defects, or otherwise, shall be maintained unless begun within thirty days after performance of the act or the passage of the resolution or ordinance complained of, or else be thereafter forever barred.”

As appears by the petition filed herein the board of supervisors, after due notice, sat on February 2, 1917, as a board of equalization to hear and receive complaints and objections respecting the method of apportionment and the proposed assessments. At that hearing no protests, complaints or objections were made or filed by any person, that the assessment ordinance for this improvement was approved March 1, 1917, and written notice sent to the petitioner-appellant that he was assessed for \$391.85, which he refused and still refuses to pay. That said ordinance was duly published, the last day of publication being March 20, 1917. We are of the opinion that the limitation began to run from March 20, 1917, the last day of publication of the assessment ordinance, hence more than thirty days transpired between the passing of the ordinance complained of and the commencement of this suit. That the limitation was reasonable and constitutional. The petitioner-appel-

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lant's injury, if any, was due to his own laches and negligence and did not proceed from the thirty-day limitation. This view is amply sustained by the authorities. *Hildreth v. Longmont*, 47 Colo. 79; *City of Denver v. Campbell*, 33 Colo. 162; *Rockwell v. Junction City*, 92 Kan. 513, reaffirmed in 93 Kan. 142, 268.

The fifth contention of petitioner-appellant has been necessarily passed upon in reviewing the other claims of the petitioner-appellant and need not be further considered.

The decree sustaining the demurrer is affirmed.

*P. L. Weaver and E. C. Peters* (*P. L. Weaver and Peters & Smith* on the brief) for petitioner-appellant.

*A. M. Cristy*, First Deputy City and County Attorney, for respondents.

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IN THE MATTER OF THE TRUST ESTATE OF  
HENRY A. P. CARTER, DECEASED.

No. 1141.

RESERVED QUESTION FROM CIRCUIT JUDGE, FIRST CIRCUIT.  
HON. C. W. ASHFORD, JUDGE.

SUBMITTED NOVEMBER 12, 1918.

DECIDED NOVEMBER 22, 1918.

COKE, C. J., KEMP AND EDINGS, JJ.

**WILLS**—*attempt to confer jurisdiction.*

Where a testator in his will attempts to confer jurisdiction upon a judge in his judicial capacity, where the judge as a matter of law has jurisdiction in the premises, the judge acts by virtue of the law conferring jurisdiction upon him and not under the authority of the provisions of the will, and in case jurisdiction is subsequently taken from such judge and is transferred to another judge the power to act *ipso facto* passes to such other judge.

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**TRUSTS—appointment of trustee.**

The will of C, dated in 1889 and probated in 1891, named two trustees to execute the trust created and provided that whenever the beneficiaries of the trust or a majority of them shall apply to a justice of the supreme court a third trustee shall be appointed. Held, that by the Judiciary Act of 1892 all original equity jurisdiction having been taken from the several justices of the supreme court and reposed in the circuit judges of the islands, the power to appoint a third trustee is now exercisable by a circuit judge and not by a justice of the supreme court.

## OPINION OF THE COURT BY COKE, C. J.

Henry A. P. Carter, deceased, by his last will and testament dated August 17, 1889, and admitted to probate in the supreme court of the Hawaiian Islands on December 30, 1891, after making certain specific bequests, devised and bequeathed the residue of his property to two trustees in trust to pay the income of one-sixth thereof to each his wife and five children for life and after the death of each of the beneficiaries he devised the one-sixth of the estate, the income of which was payable to such beneficiary for life, to the heirs of such beneficiary to be divided as then prescribed by the laws of Hawaii in cases of persons dying intestate. There are now four remaining beneficiaries, all at present absent from the Territory of Hawaii, and the present trustees are George R. Carter and John R. Galt, both of whom are also absent from the Territory. The will provides as follows with reference to the appointment of trustees:

“Fourth. I appoint Peter C. Jones and Joseph O. Carter of Honolulu to be my trustees to carry into effect the trusts above specified and direct them and their associates and successors in trust to lease sell or convey any of my property and to reinvest the proceeds and balances of my estate in such manner as to them may seem best for the uses and purposes of the trusts hereinbefore declared. I also direct that my said trustees shall yearly make a full and complete account of all receipts and expenditures to a justice of the supreme court of the Hawaiian Islands, and file before such

## Opinion of the Court.

a justice whenever ordered an inventory of all property in their hands and how invested. I direct that no bonds be required of said Peter C. Jones and Joseph O. Carter, but there may be of their successors unless otherwise agreed to by the beneficiaries of the trust. Whenever the beneficiaries of this trust or a majority of them shall apply to a justice of the supreme court a third trustee shall be appointed to act with those herein named or their successors with the same powers."

The four surviving beneficiaries deeming it advisable that the Hawaiian Trust Company, Limited, a local trust concern, should be appointed as a third trustee, in view of the absence from the Territory of the two existing trustees, have made application for that purpose—three of the applications being addressed to the presiding judge of the circuit court of the first circuit at chambers, in equity, and one of the applications being addressed to the chief justice of the supreme court of Hawaii.

In accordance with the desires of the surviving beneficiaries the Hawaiian Trust Company has petitioned the presiding judge of the circuit court of the first circuit at chambers in equity for the appointment of itself as a third trustee of the estate under the provisions of the will. The presiding judge of the circuit court at chambers in equity has reserved for our consideration the question whether the power of appointment of a third trustee under the will is exercisable by a justice of the supreme court or by a judge of the circuit court of the first circuit at chambers in equity and the matter is now before us upon the question thus reserved.

It was held by this court in *Estate of Bishop*, 23 Haw. 575, that where the will provided that vacancies among trustees should be filled by the choice of a majority of the justices of the supreme court, the power was given to them not in their judicial capacity but in their individual capacity because the testatrix could not confer jurisdiction

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and the jurisdiction to appoint trustees at that time was not in a majority of the justices but in each justice acting singly. This opinion was, on appeal, affirmed by the circuit court of appeals ninth circuit. See 250 Fed. p. 145. At the times both the Pauahi Bishop will and the Henry A. P. Carter will were executed and subsequently offered for probate original jurisdiction in equity matters was exercised by a single justice of the supreme court sitting in equity at chambers. During that period the justices of the court, exercising original equity jurisdiction, did not act jointly or as a court in banco. By the Judiciary Act of 1892 the original probate jurisdiction of the several justices of the supreme court was conferred upon the judges of the circuit courts throughout the islands. In the decision in *Estate of Bishop, supra*, this court very clearly indicated that if by the provision of the will of Bernice Pauahi Bishop the power to fill vacancies among the trustees had, as in the present case, been conferred upon any justice of the supreme court it would have been held that the authority to appoint was conferred upon the justice in his judicial capacity. Where a testator in his will attempts to confer jurisdiction upon a judge in his judicial capacity, where the judge as a matter of law has jurisdiction in the premises, the judge acts by virtue of the law conferring jurisdiction upon him and not under the authority of the provisions of the will, and in case jurisdiction is subsequently taken from such judge and is transferred to another judge the power to act *ipso facto* passes to such other judge. *Allen's Appeal* 69 Conn. 702, 707; *Leman v. Sherman*, 117 Ill. 657, 664; *Harwood v. Tracy*, 118 Mo. 631, 637; *Carr v. Corning*, 73 N. H. 362, 365. This we think is the case here. The Judiciary Act of 1892 took from the several justices of the supreme court all original equity jurisdiction and reposed the same in the circuit judges of the islands.

Answering, therefore, the reserved question submitted by

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the circuit judge we hold that the power of appointment of a third trustee to act with the trustees named in the will of Henry A. P. Carter, deceased, or their successors, is exercisable by a circuit judge of the circuit court of the first judicial circuit at chambers in equity and that such power is not now reposed in any justice of the supreme court.

*Frcar, Prosser, Anderson & Marx* for applicants.

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JOSEPH J. MIEHLSTEIN v. KING MARKET COMPANY, A CORPORATION.

No. 1089.

ERROR TO CIRCUIT COURT, FIRST CIRCUIT.

HON. S. B. KEMP, JUDGE.

ARGUED NOVEMBER 8, 1918.

DECIDED DECEMBER 2, 1918.

EDINGS, J., AND CIRCUIT JUDGES ASHFORD AND DEBOLT IN PLACE OF COKE, C. J., AND KEMP, J., DISQUALIFIED.

CONTRACTS—*officers—public policy.*

A contract entered into by a public officer, the tendency of which is to induce such officer to become remiss in his duty to the public, is contrary to public policy and void.

SAME—*public policy.*

Where an express contract for services is void as against public policy, neither recovery thereon nor for such services on a *quantum meruit* can be had.

OPINION OF THE COURT BY EDINGS, J.

This case comes before this court upon a writ of error to review a judgment entered in favor of the defendant in the circuit court. The action was one in assumpsit for

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the balance claimed to be due the plaintiff by the defendant for services rendered the defendant in preparing plans and specifications for and supervising the erection of certain stalls, tables, counters and fixtures in the place of business of the defendant on Kekaulike street, Honolulu. The amended complaint contains three counts: one upon an express contract for the agreed sum of seven and a half per cent. of the total cost of the work to be done, "exclusive of the cost of plumbing, or the cost of the erection, repair, change, alteration, removal and reroofing of any building or structure, or the excavation of any cellar or lot for building purposes in connection therewith;" one upon an implied promise to pay plaintiff the reasonable value of his services; and one upon an account stated.

The case went to trial in the court below before a jury, and both parties having rested the plaintiff moved for a directed verdict for the amount claimed, which motion was denied by the court. Thereupon the defendant moved for a directed verdict upon the ground "that the contract sued upon was illegal and void as being contrary to public policy, the whole contract," which motion was granted and the jury instructed to return a verdict for the defendant.

The defendant was, in the year 1913, and prior thereto, conducting a market in Honolulu. It consisted of a corrugated iron roofed pavilion open on all sides and had a concrete floor. Sewer connections had been made and water pipes laid and connected with the existing fixtures in the market. This market was divided into stalls used by the vendors of meat, fish and vegetables. In the month of July, 1913, the unsanitary condition of this market caused the board of health to require the defendant to rectify the same. This it attempted to do by removing a few old fish barrels and other accumulated debris from the premises, which as a sanitary antidote was not a success. Thereafter the defendant employed the plaintiff,

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who was at the time building and plumbing inspector of the City and County of Honolulu, to prepare plans and specifications for the remodeling of and putting the said market in a sanitary condition and to superintend the work, the price agreed upon being four and one-half per cent. of the total cost of the improvements installed and changes made for the plans and specifications, and three per cent. of said cost for his services as superintendent. In compliance with the terms of this agreement plaintiff prepared plans and specifications of the work proposed to be done. These plans were afterwards submitted to the board of health, who approved the same, and were accepted by the defendant. These plans and specifications show, and the testimony of the plaintiff discloses, that the contract was for the designing, construction and installing of slop sinks, open and closed drains, tables, meat blocks, drainage, dirt-catchers, sewer connections, underground drains and pipes in the concrete floor, the repairing of the concrete floor in places and the tearing up and rebuilding of the floor and foundation in other places in "order to carry out the sanitary idea so that it would drain properly" in addition to other work to be performed by the plaintiff, the entire scheme having for its primary object the sanitation of the market.

The defendant relies solely upon the illegality of the contract, contending that the entire contract was void as being contrary to public policy.

Ordinance No. 43 of the City and County of Honolulu, entitled "An ordinance establishing rules and regulations for the plumbing and drainage of buildings and the construction of house sewers \* \* \*; providing for the appointment of plumbing inspectors \* \* \* and prescribing their powers and duties," etc., provides (Sec. 1) that the board of supervisors shall appoint "a suitable person as plumbing inspector \* \* \*, who shall not engage



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in the plumbing business as a master or journeyman plumber in the City and County during his term of office;" that (Sec. 8) "Any person \* \* \* before doing any plumbing work in any building of any description (except in cases of leaks, etc.) \* \* \* shall file with the plumbing inspector plans and specifications which shall clearly show and indicate the entire work to be done \* \* \*." This ordinance further provides for the manner of construction of slop sinks and the kind and size of waste pipes to be used in connection therewith and that sinks or wash trays when constructed or used in buildings used for industrial purposes may be built of certain material "as directed by the plumbing inspector," and further that all house sewer, house drain, soil, waste and vent pipes before being covered shall be tested and made water-tight, which test shall be made in the presence of the plumbing inspector. Ordinance No. 29, as amended by ordinance No. 33, provides: "Section 1. (a) No person \* \* \* shall erect, change, repair, alter, remove or reroof any building or structure, or excavate any cellar or lot for building purposes \* \* \* unless he \* \* \* shall first obtain a permit for the work from the building inspector. \* \* \* The application for such permit shall be made on a prescribed form and shall state \* \* \* the materials to be used in the construction of the same, the dimensions and estimated cost of the same \* \* \* the names of the owner, the architect and the builder \* \* \* that if any frame building or structure or corrugated iron building heretofore constructed \* \* \* shall be repaired the owner of such building shall, before the commencement of such repairs file with the building inspector a statement showing the estimated cost of such repairs." And in various other matters connected with the repair or construction of buildings it is made the official duty of the building inspector to decide questions involving the proper construc-

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tion of the work, i. e., the compliance of the owner or contractor with the requirements of the ordinance.

It has long been settled that any contract or agreement entered into by an official, holding a position of the nature held by the plaintiff, with a private individual whereby he undertakes to render services, the performance of which for an outsider he was prohibited from doing, or which might be inimical to the faithful and conscientious discharge of his official duties, is inconsistent and conflicting with his obligation to the public, and is illegal even without being prohibited by statute.

“When a contract belongs to a class which is reprobated by public policy it will, as a general rule, be declared void and unenforceable, although in the particular instance no injury to the public may have resulted.” 2 Elliott on Contracts, Sec. 652. And “in determining whether or not a contract is contrary to public policy the contract must be measured by its tendency and not merely by what was done to carry it out.” *id.* Sec. 649. “The courts will unhesitatingly pronounce illegal and void, as being contrary to public policy, those contracts entered into by an officer or agent of the public which naturally tend to induce such officer or agent to become remiss in his duty to the public. Nor is it necessary for the officer or agent to bind himself to violate his duty to the public in order to bring such an agreement within the operation of the rule. Any agreement by which he places himself or is placed in a position which is inconsistent with his duty to the public and has a tendency to induce him to violate such duties, is clearly illegal and void.” *id.* Sec. 706. Greenhood, Public Policy, p. 337, states the doctrine thus: “Any contract by one acting in a public capacity, which restricts the free exercise of a discretion vested in him for the public good, is void.” In *Stropes v. The Board of Commissioners of Greene County*, 72 Ind. 42, in which the question involved

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was of this nature, the court said: "There is neither a more wholesome nor a sounder rule of law than that which requires public officers to keep themselves in such a position as that nothing shall tempt them to swerve from the straight line of official duty. Officers ought not to be permitted to place themselves in a position in which personal interest may come into conflict with the duty which they owe to the public." "An officer's duty is to give to the public service the full benefit of a disinterested judgment and the utmost fidelity. Any agreement or understanding by which his judgment or duty conflicts with his private interest is corrupting in its tendency. The fact that the acceptance of such employment was without fraud and without prejudice to the interests of the taxpayers is immaterial." 6 R. C. L. p. 739, Sec. 144.

Clearly this contract embraced within its terms work to be done, and duties to be performed by the plaintiff which he was legally and morally disqualified to perform.

But plaintiff contends that the "bad" being separable from the "good," plaintiff is entitled to recover for the "good." This is unquestionably the law in many cases of illegal contracts, where there are several distinct and separate items each based upon a separate consideration, or where goods are sold at a separate price for each article, and some of the considerations, or the sale of some of the articles, are illegal.

In this case the services, physical, intellectual and technical, to be rendered by the plaintiff were inseverable and indivisible and all having for their sole object the sanitation of the market, and "if any part of a nonseparable contract is void for illegality or reasons of public policy, the taint extends to every part of it, and neither party can enforce any of its provisions against the other." 6 R. C. L., Sec. 214, p. 215.

The contention of plaintiff that he is entitled to recover

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upon an implied contract for the reasonable value of the services rendered by him upon the valid covenants that were severable from the alleged invalid portion of the contract cannot be sustained. A recovery for the reasonable value of work done presupposes a contract. The theory upon which recoveries are allowed, when there is no express contract, is, that justice requires that courts declare that a contract exists by implication. Where there are no parties capable of contracting, or where public policy prohibits a contract, there cannot be any kind of a valid contract, either by express agreement or by implication.

The judgment appealed from is affirmed.

*E. C. Peters* for plaintiff in error.

*Harry Irwin* for defendant in error.

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IN THE MATTER OF THE SETTLEMENT OF THE  
BOUNDARIES OF ONE PART OF THE AHU-  
PUAA OF PAUNAU.

No. 1109.

APPEAL FROM COMMISSIONER OF BOUNDARIES, SECOND  
CIRCUIT.

SUBMITTED NOVEMBER 22, 1918.

DECIDED DECEMBER 7, 1918.

COKE, C. J., KEMP AND EDINGS, JJ.

BOUNDARIES—*jurisdiction of commissioner.*

A boundary commissioner is authorized to decide and certify boundaries only upon the petition of an owner and his jurisdiction exists only in cases where the petitioner's ownership of the land claimed in his petition is not contested.

Opinion of the Court.

SAME—*same*.

In a proceeding under chapter 31 R. L. 1915 by an alleged owner of land to have the boundaries thereof decided and certified by the boundary commissioner and a contestant files a claim asserting title in himself to a definite portion of the land claimed in the petition the boundary commissioner is without jurisdiction to proceed in the matter and should dismiss the petition.

SAME—*same*.

Where the dispute as to ownership arises solely by reason of adverse claims as to the location of the common boundary of two adjoining lands a proper case for the commissioner of boundaries is presented.

OPINION OF THE COURT BY KEMP, J.

This is a proceeding for the settlement of the boundaries of the mauka portion of the ahupuaa of Paunau instituted before the boundary commissioner for the second judicial circuit. The petitioners, the trustees under the will and of the estate of Bernice Pauahi Bishop, deceased, set forth in their petition, in substance, that in and by land commission award No. 7713, apana 26, the board of commissioners to quiet land titles in the Kingdom of Hawaii, under date of April 7, 1854, awarded to Victoria Kamamalu all of the ahupuaa of Paunau in or near Lahaina, Maui, and that the said ahupuaa of Paunau was awarded by name only and not by boundaries defined or specified in said award; that in and by royal patent No. 4475 dated April 3, 1861, there was granted and confirmed unto said Victoria Kamamalu, in and by apana 26 thereof, the aforesaid ahupuaa of Paunau, and that in said patent the grant of said ahupuaa was by name only and not by boundaries described or specified in said patent and that the boundaries have never been judicially settled; that the petitioners, as such trustees, are and claim to be, as successors in title and interest to Victoria Kamamalu, the owners of all of the mauka part of the ahupuaa in question and that as such owners are desirous of having the boundaries of the

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said mauka part settled. By schedule and map or plat attached to and made a part of the petition is set forth a description by metes and bounds of what the petitioners claim are the outer boundaries of said mauka portion of said ahupuaa as the same existed at the time of the award to Victoria Kamamalu and as the same are now claimed by the petitioners.

Prior to the filing of the petition upon which the hearing was had the petitioners had filed a first petition, which was withdrawn upon the filing of the petition upon which the hearing was had, in which first petition the boundaries by survey were claimed to be practically as now contended for by the Territory, as hereinafter set out. In the first petition the commissioner was asked to adjudicate the boundaries of said ahupuaa without mentioning any date to which the adjudication should apply.

In due time the Territory of Hawaii filed its claim and protest in which it claims to be the owner and/or to have the right to the custody, control and possession and power of disposition, under the United States of America, of all that portion of the land described in the second petition lying south of a line (described by course and distance in said claim and protest) running generally along the south pali of Kahoma valley and claimed by said Territory to be the northern boundary of the Lahainaluna school land so-called and the southern boundary of the land covered by the award to Victoria Kamamalu. The Territory in setting forth the source of its alleged title to said portion of the land claimed by it says, in substance, that between 1831 and 1835 the King and chiefs, the then owners thereof, gave and transferred to the American Board of Commissioners for Foreign Missions the land now claimed by the Territory; that it was held and occupied by said board for the Lahainaluna seminary without dispute from 1831, or at the latest 1835, until the said

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land was transferred and given by said board to the government of the Kingdom of Hawaii, upon certain conditions which were accepted by the privy council in 1849 and ratified and confirmed by the legislature of the Kingdom in 1850 and the school and the land now claimed by it were thereby transferred to the government, all of which was prior to the award under which the petitioners claim title; that the government has never parted with the possession nor title to the land now claimed by it but has retained both possession and title without dispute or adverse claim until the present date, that is to say, the title and possession of said land has been in the Territory of Hawaii and its predecessors in interest from at least 1835 without interruption.

In the concluding paragraph of its claim and protest the Territory says that, without waiving or intending to waive any other grounds of protest or objection to which it may be entitled in the premises, the boundary commissioner is now without the jurisdiction to hear and adjudicate the boundaries of the so-called mauka portion of Paunau in so far as the said alleged boundaries encroach upon the land now claimed and owned by it and that it does not consent to such hearing and adjudication but objects to the same. It says further that any proceedings by the commissioner with the view to adjudicating the southerly boundary of Paunau will, unless said southerly boundary be fixed as being no further south than the southerly pali of the Kahoma gulch (the south pali of Kahoma gulch being claimed by the Territory as the south line of its land as set out in its description attached to its protest), be to the prejudice of and in contravention of the rights of the Territory and wholly illegal and void and without effect and in this behalf the Territory further states that the said southerly pali of Kahoma valley is the southerly line of the mauka part of the land of Paunau

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which was awarded to Victoria Kamamalu by L. C. A. 7713, apana 26, and confirmed by R. P. 4476.

The contention of the Territory as disclosed by its claim and protest seems to be twofold. First, that by reason of the gift of the King and chiefs to the mission board and the subsequent transfer to the Hawaiian Kingdom the portion of the land claimed by it ceased to be a part of the ahupuaa in question prior to the award thereof and did not therefore pass to Victoria Kamamalu by the award of Paunau to her, and, second, that if the land in question was included in the award of Paunau to Victoria that the Territory has now acquired title by adverse possession and in either event now objects to the commissioner adjudicating the boundaries of its land upon the application of the petitioners.

At the hearing before the commissioner the Territory insisted and in its brief insists that, in view of its claim of title to a specific portion of the land claimed by petitioners, the commissioner should have refused to hear the case until the question of title was settled in a court of competent jurisdiction, and that in any event the commissioner could only determine the ancient boundaries of the ahupuaa, while the petitioners insisted that he adjudicate the boundaries as they existed at the date of the award.

The commissioner took the view that to attempt to adjudicate the boundaries as they existed at the date of the award would necessitate an adjudication as to the validity of the title claimed by the Territory, which was beyond his jurisdiction. He therefore overruled the contention of the petitioners and the first contention of the Territory and rejected all evidence except such as he conceived to relate to the ancient boundaries of the ahupuaa and confined his findings and adjudication to the ancient boundaries as they existed prior to the award.



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Other contestants appeared and filed their claims but with the exception of the claim of the Territory they were all amicably settled by stipulation and need not be noticed by us.

At the hearing it was admitted by all parties that the ahupuaa of Paunau was by name only awarded to Victoria Kamamalu by L. C. A. 7713, likewise granted to her by R. P. 4475 by name only, and also that the petitioners as trustees of the Bishop Estate are the successors in interest and title to Victoria Kamamalu and hold the record title to all of the ahupuaa as awarded to Victoria Kamamalu. It was expressly stipulated that the above admissions did not relate to present ownership of said lands.

The petitioners produced several kamaainas who gave evidence as to the boundaries of Paunau as the same were told to them by their ancestors, after which the surveyor who did the surveying for petitioners for use in this proceeding testified that he made a survey of Paunau following the information given him at the time by some of the same kamaainas who have testified before the commissioner and also using for his guidance a survey, field notes and map of Paunau made by W. P. Alexander, found in the book of undated Lahaina surveys on file in the office of the surveyor of the Territory of Hawaii, and a survey and notes of said ahupuaa made by Geo. F. Wright, also taking into account the recorded surveys of adjoining lands, and that the field notes and map or plat attached to the petition were made by him as the result of his survey and that they are a correct translation or amplification in surveying terms of the boundaries of Paunau as so ascertained by him.

The contestants offered no kamaaina evidence as to the boundaries of Paunau other than such as they sought to develop upon cross-examination of petitioners' witnesses. The Territory did, however, seek to prove the allegations

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of its claim and protest as to the acquisition by it in the manner set forth in its claim and protest of title to a definite portion of the land claimed by the petitioners to be a portion of the ahupuaa of Paunau but upon objection of petitioners same was by the commissioner excluded and the case was decided wholly upon the evidence produced by the petitioners.

The commissioner entered a decree finding the lawful and equitable ancient boundaries of the mauka portion of the ahupuaa of Paunau (before any award was issued) to be practically as claimed by the petitioners but inserted in said decree a statement that Lahainaluna school holds and claims that portion of Paunau south of the south edge of Kahoma valley and inserted in the map or plat accompanying said decree the same statement at the places where the land so claimed is represented in said map or plat.

From this decree the petitioners have appealed to this court, their particular complaint being that the commissioner should have found and decreed what the boundaries were at the date of the award instead of the ancient boundaries as they existed before the award was made, though admitting that the boundaries as found by the commissioner are the boundaries as of the date of the award. The petitioners also insist that the statement inserted in the decree and on the map or plat attached to it to the effect that the school claims and holds that portion of the land south of the south edge of Kahoma valley should not have been inserted therein. These we understand to be the principal contentions of the petitioners.

The Territory has not appealed but now insists, first, that since it appeared from the claim and protest filed by it that it was claiming title to a specific portion of the ahupuaa in question the commissioner should have refused to assume jurisdiction to adjudicate the boundaries

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in this case over the Territory's objection and should have either dismissed the petition or have required the petitioners to first establish their title to the disputed portion in a court of competent jurisdiction, and, second, that if the above contention is not upheld the commissioner was correct in holding that only the ancient boundaries as they existed prior to the award could be adjudicated by him, and in that event his decree should be affirmed.

If this first contention of the Territory should be sustained it would obviously require a reversal of the decree of the commissioner with an order to the commissioner to either suspend action in the matter pending a settlement of title or to dismiss the petition. We will therefore first consider the question thus raised as a decision favorable to the Territory will render a consideration of the questions raised by the petitioners unnecessary.

The whole scheme of deciding and certifying boundaries in such proceeding as that under consideration is peculiar to this jurisdiction and was created by statute to meet a situation that had grown out of the manner in which private ownership of lands originated in this country.

With the Hawaiians, from prehistoric times, every portion of the land constituting these islands was included in some division, larger or smaller, which had a name, and of which the boundaries were known to the people living thereon or in the neighborhood. After the surrender by Kamehameha III, in 1848, of the greater part of the land of the Kingdom to his chiefs and people, the necessity of a speedy distribution of it in accordance with what may be called the feudal rights of the chiefs required that awards of lands be made by name only without survey. No body of surveyors could have been found in the country or practically could have been brought here who might have surveyed these large estates within the lifetime

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of half the grantees, so that every award should have been issued as of a tract defined by metes and bounds, or even with an approximate statement of the acreage. The "mahele" or division was therefore made without survey. Tracts of land known to Hawaiians as an ahupuaa or ili were awarded to those entitled by name of the ahupuaa or ili. By such grant was intended to be assigned whatever was included in such tract, according to its boundaries as known and used from ancient times. *In the matter of the Boundaries of Pulehunui*, 4 Haw. 239.

To carry out the intention of the King in dividing up the lands of his kingdom, a commission known as the board of commissioners to quiet land titles was created before whom it became the duty of those who had by the "mahele" or division been given lands to make proof of their claims and this board issued awards, in some instances by definite description but in many by name only just as in the great "mahele." In order to enable those who had been awarded lands by name only to afterward procure an authentic description of their land the office of commissioner of boundaries was created. The statute which establishes the office of commissioner of boundaries as presently constituted prescribes that "owners of ahupuaas and portions of ahupuaas, ilis and portions of ilis and other denominations of lands" may file with the commissioner of boundaries, when the other jurisdictional facts are present, an application to have the boundaries of said land decided and certified to by said commissioner. The particular section of the statute in question, being section 452 R. L. 1915, is, in part, as follows:

"Section 452. Application. All owners of ahupuaas and portions of ahupuaas, ilis and portions of ilis and other denominations of lands within the Territory of Hawaii, whose lands have not been awarded by the land commissioners, patented or conveyed by deed from the king or government, by boundaries decided in such award, patent

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or deed, may file with the commissioner of boundaries for the circuit in which the land is situated, an application to have the boundaries of said land decided and certified to by said commissioner or his successor in office."

The exact question now presented for determination does not appear to have arisen heretofore so we have no precedent to guide us. It seems clear to us, however, from reading the statute just quoted, that the right to file a petition for the purpose of having boundaries decided and certified was conferred only upon the owner of the land to be dealt with. The commissioner is not given by the statute the jurisdiction to adjudicate titles and this court has decided that he has not that power. *Board of Education v. Bailey*, 3 Haw. 702-704.

If, therefore, when a petition is filed before the commissioner to have the boundaries of a certain land decided and certified, a proper claim and protest is filed by one other than the petitioner alleging that he and not the petitioner is the owner of the land in question and objects to the boundaries being decided, what course should the commissioner pursue?

As we have seen, the statute gives the right of petition to owners only. In such a case in order to determine whether the petition was filed by one having that right, the commissioner would have to determine the question of ownership and it is beyond his jurisdiction to do so. The case we have assumed is, in principle, quite analogous to a summary proceeding before a district magistrate by a landlord against an alleged tenant for possession of real estate, and the answer of the alleged tenant is a denial of tenancy and an assertion of title in himself. In such case the district magistrate is robbed of his jurisdiction and must dismiss the case. *Coney v. Manele*, 4 Haw. 154; *Kaaihue et al. v. Crabbe*, 3 Haw. 768; *Harrison v. McCandless*, 22 Haw. 129; *Yanagi v. Oka*, 24 Haw. 176.

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The landlord and tenant statute confers jurisdiction upon the district magistrate to hear and determine the right of possession between the landlord and his tenant but the cases hold that his jurisdiction exists only in cases where the relation of landlord and tenant confessedly exists. The statute in question confers jurisdiction upon the boundary commissioner to decide and certify boundaries upon the petition of an owner and we think that his jurisdiction exists only in cases where the petitioner is admitted to be the owner of the land claimed by him to the extent of its ancient boundaries. The object in creating the office of boundary commissioner and giving him the right to decide and certify boundaries was to enable owners of land which had been awarded or otherwise granted by name only to obtain royal patents defining their lands by metes and bounds. *Greenwell v. Paris*, 6 Haw. 315. If this is the object in having boundaries decided and certified it would be idle for the commissioner to decide and certify the boundaries of land claimed by A when B is asserting that he and not A is the owner and objects to a hearing of the case on A's petition.

The Territory in this case is asserting that it is in possession of some 250 acres of the land included in the petition and has held such possession continuously ever since the award of the land in question and for a long time prior thereto, claiming title thereto. If these allegations are true it, and not the petitioners, is the owner of that part so held by it. If under these circumstances the commissioner can take and hold jurisdiction he must necessarily decide and certify the boundaries of the Territory's land upon the petition of one who has no right to represent it and over its objection. The fact that the petitioners are admitted to be the owners of a portion of the land described in their petition would make no difference.

It is argued by the petitioners in their brief that if at

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the date of the award to Victoria Kamamalu the ahupuaa of Paunau included within its boundaries the 250 acres claimed by the Territory the court must so decree irrespective of whether or not by reason of anything said or done subsequently Victoria or her successors in interest lost their title by adverse possession, by deed, by gift or otherwise. This is equivalent to saying that the commissioner can only decide and certify boundaries to whole ahupuaas, while the statute expressly authorizes him to decide and certify the boundaries of portions of ahupuaas upon the petition of the owner of such portion. Section 452 R. L. 1915, above quoted.

Of course where the dispute as to ownership arises solely by reason of adverse claims as to where the common boundary of two adjoining lands is located a proper case for the commissioner of boundaries is presented and nothing we have said in this opinion is to be construed as denying the commissioner's jurisdiction in such a case.

We are of the opinion and hold that when the Territory filed its claim and protest asserting that it, and not the petitioners, is now the owner of a definite portion of the ahupuaa of Paunau, by reason of the adverse possession set up by it, that the commissioner should have refused to assume jurisdiction and should have dismissed the petition.

The decree of the commissioner is reversed and the cause ordered dismissed.

*A. Perry and Robertson & Olson* for petitioners.

*A. G. Smith*, Attorney General, for the Territory.

## Syllabus.

S. W. NAWAHIE, BY HIS NEXT FRIEND, J. LIGHT-  
FOOT *v.* CHARLES F. PETERSON AND GABA-  
LIELA KAMALANI.

No. 1098.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

HON. C. W. ASHFORD, JUDGE.

SUBMITTED NOVEMBER 22, 1918.

DECIDED DECEMBER 14, 1918.

COKE, C. J., KEMP AND EDINGS, JJ.

PLEADING—*next friend*.

Where a suit is brought by a *prochein ami* or next friend the petition or declaration should show upon its face that the plaintiff is laboring under some legal disability which prevents him from instituting and managing the suit himself.

SAME—*fraud*.

On pleading fraud either at law or in equity the specific facts constituting the fraud must be stated in the declaration or petition, not conclusions.

OPINION OF THE COURT BY EDINGS, J.

The record in this case shows that on the 9th day of February, 1918, J. Lightfoot, as next friend of S. W. Nawahie, filed a bill in equity against Charles F. Peterson and Gabaliela Kamalani, the object of which is to set aside a trust deed from Nawahie to Peterson in which Kamalani is a beneficiary on the ground of fraud, for an accounting, and for an injunction.

In response to an order to show cause why a temporary injunction restraining the respondent Peterson, the trustee named in the deed, from collecting the revenue of the property covered by the deed should not be granted the respondent Peterson made a special appearance, and, pursuant to terms offered by the court, elected to continue to



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collect the accruing revenue and to deposit the same in the registry of the court. Thereafter the respondent Peterson interposed a demurrer to the bill of complaint upon four grounds, viz.: (1) "That the petitioner has not in and by his said bill of complaint made or stated such a cause as entitles him in equity to the relief prayed for, or any relief, against this respondent." (2) "That no facts are set forth in said bill which show a reason why said S. W. Nawahie may or should appear as petitioner herein by or through a next friend." (3) "That said bill of complaint does not set forth facts which show that said J. Lightfoot has any authority to appear herein or to maintain this suit as a next friend of said S. W. Nawahie." (4) "That said bill of complaint sets forth no facts which show that the said J. Lightfoot, as next friend, or otherwise, has any right or interest in the subject matter of said cause." Subsequently the respondent Kamalani filed a demurrer setting forth the above grounds, and an additional ground, as follows: "That the facts which may be relied on to show the alleged fraud and deceit on the part of said Peterson in connection with the execution by said petitioner of the trust deed, referred to in said bill of complaint, are not set forth in said bill."

The demurrers were sustained by the circuit judge with leave to amend, but the petitioner elected to stand upon his bill and a decree dismissing the bill was entered.

The averments of the bill of complaint are in substance as follows: That petitioner is eighty-five years old; that by reason of the advanced age of petitioner and the infirmities of mind and body incident thereto, petitioner has from time to time been compelled to rely upon the assistance of others for the transaction of his business affairs, and when so relying upon the assistance of others has been accustomed to place absolute faith, trust and reliance upon them; that on the 26th day of March, 1917, a suit was filed

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in the circuit court of the first circuit of this Territory wherein petitioner by his next friend Akala Lamnui was petitioner and Gabaliela Kamalani, the respondent named in the present suit, was respondent, the object of which suit was to procure the cancellation of a certain deed, executed by petitioner to said Kamalani on or about the 7th day of February, 1917; that petitioner retained the respondent Peterson as his attorney to act for him in the matter of said suit and paid to him certain sums of money for his services therein; that said Peterson has since acted as his attorney in said suit both in the circuit court and in this court, the records of which suit are referred to in said petition. These records disclose that "Nawahie appeared and moved to dismiss the bill of complaint averring in his motion that the suit was instituted and filed without his consent \* \* \*; that he is of sound mind and mentally competent to institute, prosecute, terminate, withdraw and discontinue said suit and said bill of complaint and to protect all of his interests in the property involved thereunder and to transact all matters of business. This motion was accompanied by the affidavit of Nawahie which substantially recounts the matters contained in the motion" (*Nawahie v. Kamalani*, 24 Haw. 82); that shortly afterwards the respondent Peterson represented to petitioner that it would be desirable, proper and necessary for the preservation of the rights of petitioner" to have petitioner appoint said Peterson to care for and protect the property of petitioner, real and personal, and having absolute confidence in said Peterson petitioner placed large sums of money in his hands; that the said Peterson purchased land for petitioner, a portion of which land petitioner desires to retain, and as to the remainder believes that said Peterson charged petitioner a commission amounting to about twelve hundred dollars and included the same in the alleged purchase price of the

## Opinion of the Court.

land; "that on the 31st day of January, 1918, and after the said Peterson had been requested to account with petitioner, the said Peterson filed in the registry office for record, a purported trust deed, purporting to have been executed by petitioner, in which it is pretended that petitioner conveyed all his property real and personal, to said Peterson, in trust, for the benefit of said respondent Gabaliela Kamalani;" "that said petitioner signed many papers at the request of said Peterson, having full trust and confidence in him as aforesaid, but petitioner never knowingly signed a trust deed conveying all of his property to said Peterson as aforesaid, and that the signature of said petitioner to said trust deed, if indeed such signature was ever attached thereto, was procured by the said Peterson by fraud and deceit and was not the free act and deed of said petitioner." The trust deed in question is attached to and made a part of the bill of complaint. This deed shows that it was executed on the 29th day of May, 1917, and was duly acknowledged by the said Nawahie and the said Peterson on the same date, which acknowledgment recites "that they executed the same as their free act and deed;" that petitioner has requested Peterson to cancel said trust deed and to account with petitioner, which he refuses to do. There is also an endorsement on the bill of complaint by the said Nawahie, that he thoroughly understands the same and has requested J. Lightfoot to prepare and file the said suit for him as his next friend and in his name; that the averments contained in said bill of complaint are true and that he joins in the prayer thereof.

The second, third and fourth grounds of demurrer are to the suit having been instituted by a "next friend" instead of by Nawahie himself.

We are unable to discover any averments in the bill which show that the petitioner is under any legal disabil-

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ity or is unable to look after his own interests. Indeed there are averments in the bill which show conclusively that he was fully competent and legally able to institute the suit himself.

“A next friend or *prochein ami* is not a party to the suit, but simply a person appointed by the court to look after the interests of one who by reason of some legal disability is unable to look after his own interests, and to manage the suit for him.” 14 Ency. Pl. & Pr. 998.

“Where an action is prosecuted by a next friend, disability of the plaintiff must be averred or a demurrer will lie.” 14 Ency. Pl. & Pr. 1051.

“A declaration stating that the plaintiff sues by *prochein ami* without showing the plaintiff's infancy and the *prochein ami*'s admission, is bad on demurrer.” *Shirley v. Hagar*, 3 Blackf. (Ind.) 225.

“When a suit is brought by a next friend and it is not shown that the plaintiff is a minor, a married woman or otherwise entitled to sue by next friend, a demurrer to the bill should be sustained.” *West v. Reynolds*, 17 So. (Fla.) 740.

“Persons laboring under no disability cannot sue by next friend. The bill should upon its face show the disability. We can find neither precedent nor authority for allowing a person under no incapacity whatever to sue by next friend.” *Hunt v. Wing*, 57 Tenn. 139.

“The bill must show that the next friend has been admitted to appear by an order of the court.” *Palmer v. Sinnickson*, 59 N. J. E. 530.

In the case of *Kalaniana'ole v. Liliuokalani*, 23 Haw. 457, this court said: “If he be in fact incompetent his only representative should be the appointee of the court.” In the case of *Ahin v. District Magistrate*, 11 Haw. 279, cited by petitioner-appellant, the court held “that a district magistrate may permit a next friend to bring an action for an infant.” In *Lukua v. Manaia*, 21 Haw. 160, also cited by petitioner-appellant, this court held that “the appointment of a guardian *ad litem* of minor defend-

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ants need not be made by a formal order." Neither of which cases is pertinent to the present controversy.

We are therefore of the opinion that these grounds of demurrer were properly sustained.

The second ground of demurrer asserted by the respondent Kamalani is that the facts constituting the alleged fraud in connection with the execution of the deed are not set forth in the bill of complaint. The averment in the bill that petitioner is old and suffering from the infirmities of mind and body incident thereto is not sufficient to sustain a bill to set aside a deed upon the ground of "fraud and deceit."

The law presumes all persons to be of sound mind, and if adults capable of managing their own affairs, and the mere fact that it is alleged by a person styling himself a next friend that a particular individual, who is an adult, is of weak or unsound mind, and not capable of taking care of his own affairs, does not destroy that presumption. Nor do his own assertions constitute any proof of the truth of his statements. That "petitioner has from time to time been compelled to rely upon the assistance of others for the transaction of his business affairs and to place faith and trust in them," as recited in the bill, is not, due to the limited sphere of man's activities, an unusual condition, and in the execution of a trust deed is an unavoidable one.

The averment that complainant "never knowingly signed a trust deed conveying all of his said property to said Peterson" is not a ground for the cancellation of the deed since if he signed the deed without ascertaining its contents he has only himself to blame. *Wond v. Mikalemi*, 21 Haw. 288. There are no facts alleged to show that either the trustee, the beneficiary or any one else obtained his signature to the deed by fraud, deceit or misrepresentation, and fraud is certainly never conjectured. The aver-

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ment that complainant's signature to the deed was procured by the "fraud and deceit" of Peterson is in the nature of an opinion unsupported by any facts, and the statement of mere matters of opinion unsupported by specific facts sufficient to show that the opinion is well founded is insufficient. Where fraud is relied upon as a ground for relief the facts claimed to constitute that fraud must be averred.

"In pleading fraud either at law or in equity, it is a well settled rule that the facts must be stated in the declaration or petition, not conclusions." 20 Cyc. 96.

The mere use of the words "falsely" and "fraudulently" accomplish nothing unless they set forth the facts to which they are applied. *Darling v. Hines*, 32 N. E. (Ind.) 109.

"A bill seeking relief on the ground of fraud must distinctly state the specific facts and circumstances constituting the fraud." 16 Cyc. 231.

And the facts so stated must be sufficient in themselves to show that the conduct complained of was fraudulent. *Chapman v. Chapman*, 13 R. I. 680. General charges of fraud or that acts were fraudulently committed are of no avail unaccompanied by statements of specific acts amounting to fraud. *McHan v. Ordway*, 76 Ala. 347.

"Pleadings should set forth facts, and not merely the opinion of parties, and must be construed most strongly against the pleader." *Snow v. Halstead*, 1 Cal. 359.

"A pleading averring fraud in general terms merely as a conclusion \* \* \* is clearly bad." *Anderson Trans. Co. v. Fuller*, 73 Ill. App. 48.

"Whoever sets up fraud as a cause of action must do more than allege fraud in general terms. He must set out the specific facts in which the fraud consists." *Kerr v. Steman*, 72 Ia. 241.

"A general allegation in a pleading that a sealed instrument was obtained by fraud is not sufficient. The fraud must be set out." *Connor, Adm'r. v. The Dundee Chemical Works*, 50 N. J. L. 257.

## Syllabus.

“A bare allegation of fraud, unsupported by facts, is worthless, being a mere conclusion of law.” *King v. Murphy*, 151 N. Y. S. 476; *Beaman v. Ward*, 132 N. C. 68.

We are of the opinion that this ground of demurrer was also properly sustained.

The decree appealed from is affirmed.

*J. Lightfoot* for petitioner.

*Robertson & Olson* for respondents.

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TERRITORY *v.* SAM PUPUHI.

No. 1078.

EXCEPTIONS FROM CIRCUIT COURT, SECOND CIRCUIT.

HON. W. S. EDINGS, JUDGE.

SUBMITTED DECEMBER 10, 1918.

DECIDED DECEMBER 20, 1918.

COKE, C. J., KEMP, J., AND CIRCUIT JUDGE HEEN IN PLACE  
OF EDINGS, J., DISQUALIFIED.

INDICTMENT AND INFORMATION—*charging in the words of the statute.*

Where a statute fully defines the offense in clear and unmistakable terms a charge in the language of the statute is sufficient, but we do not find that the statute of gross cheat, that is, section 3988 R. L. 1915, contains those descriptive elements which would bring it within the category of the statutes just mentioned.

SAME—*false pretenses.*

Where the defendant is charged with false pretenses the indictment must not only set out the pretenses but must set them out with such particularity as to enable the court to determine whether they are such pretenses as come within the statute and as to apprise the accused of the charge against him.

SAME—*same.*

An indictment charging that the defendant “did designedly, by

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false pretenses, and with intent to defraud, obtain from others, to-wit, Joe Boteilho, John de Costa, Antone S. Madeira and Joe Antone Rodrigues, money of the amount and value to-wit twenty-five hundred dollars" is confined to a bare repetition of the words of the statute and is demurrable.

## OPINION OF THE COURT BY COKE, C. J.

The defendant-appellant was indicted, tried and convicted in the circuit court of the second judicial circuit for the crime of gross cheat. The indictment charges that "Sam Pupuhi at Kokomo in the County of Maui, Territory of Hawaii, on to-wit the 10th to the 19th day of April, 1916, inclusive, did designedly, by false pretenses, and with intent to defraud, obtain from others, to wit, Joe Boteilho, John de Costa, Antone S. Madeira and Joe Antone Rodrigues, money of the amount and value to wit twenty-five hundred dollars." To this indictment the defendant demurred on the ground that "the indictment did not contain allegations sufficient to constitute a valid charge of any criminal offense by the defendant or a violation by defendant of any penal statute of the Territory." The demurrer was overruled by the court and an exception to this ruling was duly taken by the defendant.

The defendant comes to this court by a bill of exceptions which contains several additional exceptions to the one hereinabove specified. We deem it necessary, however, to discuss only the single exception taken to the ruling of the court upon the demurrer to the indictment. Section 3988 R. L. 1915 defines the offense of gross cheat as follows: "Whoever shall designedly, by any false pretense, and with intent to defraud, obtain from another any money, goods, or other thing of value, is guilty of gross cheat."

The defendant questions the sufficiency of the indictment because of the absence in the indictment of any words descriptive of the false pretenses by which the defendant is alleged to have obtained the money from the



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parties named in the indictment, and for which reason he contends it is impossible to determine from the indictment whether the facts alleged are sufficient in the contemplation of law to constitute a crime, and for the same reason the defendant is not apprised of the charge against him.

Counsel for the Territory calls attention to the fact that the indictment charges the defendant with the crime of gross cheat in the words of the statute defining the offense and maintains that this is sufficient. He cites in support of his position the opinions of this court in *Territory v. Ah Cheong*, 21 Haw. 10, and *Republic v. Ah Cheon*, 10 Haw. 469. In the latter case cited we find the following paragraph: "There are no common law offenses known to our law, all are statutory and a charge of an offense made substantially in accordance with the language of the penal statute is good and sufficient." We think the expression was properly used if confined to the case then under consideration but if the intention of the court was to hold that every offense contained in the penal statutes of the Territory may be properly charged by a mere repetition of the language of the statute defining the offense we confess our unwillingness to concur therein. It is true, as held in *Territory v. Ah Cheong*, 21 Haw. 10, that where the statute fully defines the offense in clear and unmistakable terms a charge in the language of the statute is sufficient. There are some statutes in our criminal laws which so clearly and specifically define the offense that nothing more is required in the indictment than to adopt the language of the statute but we do not find that the statute of gross cheat, that is, section 3988 R. L. 1915, contains those descriptive elements which would bring it within the category of the statutes just mentioned. This statute is a generic description grouping within its scope a multitude of things the doing of any of which might constitute the crime. "The general rule that an indictment

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or information is sufficient in the charging part when it follows the language of the statute applies only in cases where there is a sufficient description of the offense intended to be created by the legislature and where a more general or generic term is used or the statute does not sufficiently define the crime or set forth all the essential elements of the crime the use of the statutory language is not sufficient." 14 R. C. L. p. 187. "In some states there are statutes dispensing with the necessity of stating the false pretenses intended to be relied upon, but in the absence of statute the indictment must state what the false pretenses are and must allege them in such terms that the court can determine whether or not the crime is within the statute, and also with such certainty that the defendant can ascertain whether they constitute an indictable offense or not." 11 R. C. L. p. 858.

In the present case the charging part of the indictment is confined to a bare repetition of the words of the statute. In the most general terms that could possibly be employed the defendant is accused of false pretenses. What the alleged false pretenses consisted of—whether they, in fact, were sufficient in contemplation of law to constitute a crime within the statute—it is impossible to determine. "It is not sufficient merely to aver in the indictment that the accused obtained the property by false pretenses. The pleader must go further and not only set out the pretense but set it out with such particularity as to enable the court to determine whether it is such a pretense as comes within the statute and as to apprise the accused of the charge against him." 19 Cyc. 423. A case peculiarly parallel to the one now before us is *People v. McKenna*, 81 Cal. 158. There the defendant was tried and convicted on an information which charged that "on or about the fifteenth day of July, 1888, in the County of San Louis Obispo, State of California, the defendant did unlawfully, knowingly

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and designedly by false and fraudulent representations and pretenses defraud one David Taylor of his personal property, to wit, twenty hogs of the value of \$203.40 lawful money of the United States," etc. The opinion of the court in that case contains the following language: "It is said by Mr. Bishop that 'to charge simply in the statutory words that the thing was obtained by fraud and pretense is not adequate. What the particular pretenses were must be stated both as notice to the defendant of what he has to answer to and as enabling the court to discern their indictable quality.' \* \* \* An information charging that the defendant did unlawfully, knowingly and designedly by false and fraudulent representations and pretenses defraud another of certain personal property without setting forth the facts constituting the fraud or stating what the representations or pretenses were does not state facts sufficient to support a conviction and should be dismissed upon a motion in arrest of judgment."

The court below should have sustained the demurrer to the indictment and the exception of the defendant to the refusal of the court to do so is sustained.

*E. R. Bevins*, County Attorney of Maui, for the Territory.

*Eugene Murphy* for defendant.

## Syllabus.

TERRITORY *v.* ALFRED ALOHIKEA.

No. 1148.

EXCEPTIONS FROM CIRCUIT COURT, SECOND CIRCUIT.  
HON. L. L. BURR, JUDGE.

ARGUED DECEMBER 10, 1918.

DECIDED DECEMBER 20, 1918.

COKE, C. J., KEMP AND EDINGS, JJ.

EVIDENCE—*check*.

The admission of the indorsement of the payee on a check in evidence, without proof of its authenticity, is error.

SAME—*false pretenses*.

On a trial for obtaining money by false pretenses the indorsement on a check purporting to have been written by defendant is not admissible against him until it is shown to have been in his handwriting.

## OPINION OF THE COURT BY EDINGS, J.

The defendant was tried in the circuit court of the second circuit of this Territory under an indictment charging him with gross cheat and was convicted of that offense. The case comes to this court on exceptions to the jurisdiction of the court, the introduction of evidence and the verdict. The indictment charges that the defendant "did designedly by false pretenses and with intent to defraud, obtain from another to wit, Emily Kaailaau Puleloa, money of the value of to wit, \$170.00."

Defendant's exception numbered two is to the court's overruling defendant's objection to the introduction of a certain check. (Prosecution's Exhibit one.) On the trial the prosecuting witness testified as follows: "I sent to him (defendant) \$170." "When I sent that money to him, I do not know whether he got it or not." "I sent a bank check." "Ah Fat's check." "I paid Ah Fat the money and

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he gave me the check." "I sent the check myself to Alohi-kea." The witness (for the prosecution) Ah Fat testified as follows: "Question. How, this check, I will ask you whether or not this check came back to you through the bank as having been paid? Answer. Yes," whereupon the check was offered in evidence by the prosecution and admitted by the court over the defendant's objection. The check in question is as follows: "Wailuku, Maui, T. H. May, 1, 1917. No. 216 The First National Bank of Wailuku, Pay to the order of Alfred Alohikea \$170.00 One Hundred Seventy Dollars S. Ahfat." Stamped "Bank of Hawaii Coll. No. 8725 Honolulu, T. H." "Pay to the order of yourselves The Bank of Hawaii, Ltd., F. B. Damon, Cashier," and is indorsed "Alfred Alohikea." There is not a particle of evidence to show that the defendant or his agent or servant, or any one authorized or designated by him, either directly or constructively, received this check or the money for which it was drawn, and while the mailing of a letter, postage prepaid, raises a presumption of receipt by the addressee, there is not even any evidence to show that the check was mailed. There can be no question but that the indorsement on this check is an essential element of the crime and on a criminal prosecution the burden is on the prosecution to prove beyond a reasonable doubt, by competent evidence, every essential ingredient of the crime charged. The general rule on the subject of proving private writings is that before they are receivable in evidence their due and valid execution or their genuineness and authority must be established. 17 Cyc. 425. This rule has repeatedly been applied not only to deeds, but to checks, notes and various other private writings. "Indorsements upon the back of written instruments are independent writings and can be read in evidence only after proof made that they are signed by the party sought to be charged." *Turrell v. Morgan*, 7 Minn. 290. "The regular and usual

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evidence of the transfer by indorsement of a check or negotiable note is by proof of the handwriting of the indorser." *Smith v. Prescott*, 17 Me. 277. "If the indorsement is not proved the note is inadmissible." *Youngs v. Bell*, 4 Cal. 201. "In order to render instruments, checks, admissible in evidence, their execution and the indorsements thereon, unless admitted, must be established by proof." *Sloan v. Fist*, 53 Neb. 691. "In an action on a negotiable note the admission of the indorsement of the payee in evidence, without proof of its authenticity, is error." *Hugumin v. Hinds*, 71 S. W. 479. "The general rule is that a document, purporting to bear the signature of a litigant, is not admissible in evidence against him unless the signature be proved or admitted." *State v. Maddox*, 73 So. 783. "An instrument purporting to be written by defendant is not admissible against him until it is shown to be in his handwriting." *State v. Grant*, 74 Mo. 33.

As this check was the sole evidence relied upon by the prosecution to establish the receipt of the money by defendant his conviction on the charge against him was erroneous.

The exception is sustained and as it disposes of the case we deem it unnecessary to discuss the remaining ones.

The cause is remanded to the circuit court for a new trial.

*E. R. Bevins*, County Attorney of Maui, for the Territory.

*Enos Vincent*, for defendant.

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IN THE MATTER OF THE ESTATE OF CECIL  
BROWN, DECEASED.

No. 1137.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

HON. C. W. ASHFORD, JUDGE.

ARGUED DECEMBER 4, 1918.

DECIDED DECEMBER 24, 1918.

COKE, C. J., KEMP AND EDINGS, JJ.

*WILLS—construction—attorney's fees.*

In cases involving the construction of a will the general rule is that where the testator has expressed his intention so ambiguously as to create a difficulty which makes it necessary to go into a court of chancery to get a construction of the will and to remove the difficulty, the costs of litigation, including reasonable attorneys' fees to all necessary parties, must be borne by the estate and the general residue is the primary fund for the payment of such costs.

*SAME—same—same.*

A contest between an annuitant and a residuary legatee as to which one is liable for the payment of an inheritance tax, to which a construction of the will is incidental, is not such a case as warrants the allowance of attorney's fees out of the estate.

## OPINION OF THE COURT BY KEMP, J.

This is an appeal from an order entered in the above entitled cause by the circuit judge of the first judicial circuit sitting at chambers in probate, denying the motion of Mary Kaniu Jarrett for the allowance of certain attorney's fees.

The litigation for which Mrs. Jarrett sought to have her reasonable attorney's fees allowed was a proceeding which originated in the probate division of said court and was finally disposed of in this court by an opinion reported in 24 Haw. 443.

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Prior to the commencement of that proceeding H. M. von Holt, who is the executor and residuary legatee under the will of Cecil Brown, deceased, obtained from the registrar of public accounts a present valuation of the annuity which the will required to be paid to Mrs. Jarrett during the term of her natural life. The value having been thus ascertained he deposited with the clerk of the court a sum sufficient to pay the portion of the annuity then due less the amount of inheritance tax which he claimed was chargeable to Mrs. Jarrett and gave notice to her of said deposit. Thereafter Mrs. Jarrett filed her petition in the probate court asking that the said executor be required to pay her the full amount of the annuity given her by said will, alleging that by reason of the terms of said will \$100 per month was to be paid to her out of the corpus of the estate, free from all taxes, offsets, incumbrances or liens of any nature whatsoever, and was not subject to the inheritance tax as claimed by said executor, and attached to her petition as exhibits a copy of the will and a copy of the notice of deposit.

This litigation was finally disposed of as shown by the opinion above referred to in accordance with the contention of the petitioner. This court, in disposing of the question there presented, after reciting the fact that certain small bequests of specific pieces of property were made by the will, set out in full the residuary clause of the will and recited the facts as to how the litigation originated substantially as we have recited them herein. In the course of the opinion in that case this court stated the question before it in the following language: "The question before us is as to the correctness of the order appealed from, which raises the question as to whether the inheritance tax is payable by the executor or residuary legatee upon the whole estate devised him, or whether the valuation of the annuity as made should be deducted from



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the corpus of the estate and the inheritance tax thereon charged to the petitioner." And in disposing of the question the court further said: "It should be borne in mind that the residuary clause transferred the estate, with the exception of the two small legacies mentioned, to the respondent, and by express provision makes the payment to the petitioner of the sum of one hundred dollars monthly a charge upon the estate so transferred to the respondent. Under our tax statutes inheritance taxes are upon transfers in contemplation of death, and not upon the property transferred (*Brown v. Treasurer*, 20 Haw. 41; *Robinson v. Treasurer*, 22 Haw. 742, 748). The transfer of the property out of which the monthly payments to the petitioner are to be made is to the respondent, and not to the petitioner. A charge of this kind only creates a lien and does not transfer the estate or create an interest therein, the title to which passes to the devisee, and not to the party to whom the charge is payable. The will devolves upon respondent the duty of paying to petitioner the monthly payment of one hundred dollars, and it is apparent from the language used by the testator that he intended that such payments should be made without deduction for any cause whatever" (pp. 444, 445).

It is one of the petitioner's contentions, in fact her principal contention, that it was the duty of the executor to procure from the court instructions as to his duties in respect to the payment of her annuity instead of arbitrarily placing his own construction upon the will which constituted his guide as to such payments and that his refusal to apply to the court for such instructions made it necessary for her to apply to the court for such instructions to him and that she should therefore be allowed her expenses necessarily expended in that behalf.

It is unquestionable that in the absence of a statute enacting a different rule an executor may always in a

## Opinion of the Court.

proper case take the opinion of the court upon the will at the expense of the estate. The reason is that it may be as essential to find out what the will means, in order to carry it out, as to take any other step or to do any other act involving expense, and the expense of so doing is just as properly incurred in the performance of the executor's official duty in the one case as in the other. *In re Donges' Estate*, 103 Wis. 497, 79 N. W. 786.

We find no decisions holding that in a proper case involving the construction of the will, the executor is not entitled to have his attorney's fees paid out of the estate. There are a number of cases from Wisconsin involving the construction of wills and instructions to executors where without discussion the court has ordered the county court to make such allowance to the respective parties out of the estate for counsel fees as in the exercise of sound discretion may be just. See *Ford v. Ford*, 33 N. W. 188; *Webster v. Morris*, 28 N. W. 353; *Scott v. West*, 24 N. W. 161. But when the matter was first called to the attention of the court the practice was condemned, and the later decisions from that State all hold that in such cases only the executor is entitled to have his attorney's fees paid out of the estate. *Patton v. Ludington*, 79 N. W. 1073; *In re Donges' Estate*, 79 N. W. 786, 792, 793; *Stephenson v. Norris*, 107 N. W. 343, 350. Wisconsin seems to be practically alone in holding that under no circumstances will the fees expended by others than the executor in an action to procure a construction of a will be paid out of the estate.

In Iowa it is the general rule that only the executor is entitled to an allowance out of the estate for counsel fees in such cases, but in that State an exception to this rule is made by holding that one who prosecutes in lieu of an interested or contumacious executor, and the sole purpose of the litigation is to procure a construction of an in-

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volved or ambiguous will, may have an allowance out of the estate for his costs and expenses, including a reasonable attorney's fee, in such behalf expended. *Downing v. Nicholson*, 99 N. W. (Iowa) 300.

The general rule as to the allowance of attorney's fees in such cases is much broader than the rule adhered to in the two States to which we have referred, their holding being possibly influenced by local statutes. The general rule is that where the testator has expressed his intention so ambiguously as to create a difficulty which makes it necessary to go into a court of chancery to get a construction of the will, and to remove the difficulty, the costs of litigation, including reasonable attorney's fees to all necessary parties, must be borne by the estate and the general residue is the primary fund for the payment of such costs. *Ingraham v. Ingraham*, 48 N. E. (Ill.) 561, 573; *Johnson v. Askey*, 60 N. E. (Ill.) 76; *Lombard v. Witbeck*, 51 N. E. (Ill.) 61; *In re Simons' Will*, 55 Conn. 239, 11 Atl. 36; *Security Co. v. Pratt*, 65 Conn. 161, 32 Atl. 396; *Moore v. Alden*, 80 Me. 301, 14 Atl. 199; *Howland v. Green*, 108 Mass. 283; *Strauc v. Societies*, 67 Me. 493; *Deane v. Home for Aged Colored Women*, 111 Mass. 132; *Morse v. Stearnes*, 131 Mass. 389; *Jacobus' Executor v. Jacobus*, 20 N. J. E. 49.

But the case at bar does not, we think, fall within the class of cases brought for the purpose of procuring a construction of a will. There was no ambiguity in the will in question and the difficulty therefore was not caused by the fault of the testator in not clearly expressing his intention so as to make the general residue of his estate liable for the expense of ascertaining his meaning. The petition in the case did not ask for a construction of the will but prayed that the executor be ordered to do what was his obvious duty, to pay to the petitioner the annuity provided for in said will. It is true that the

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court in deciding the question presented had to look to the will and declare from a reading of its provisions whether the inheritance tax should be paid out of the general residue of the estate or out of the annuity, but that was only incidental to the issue between the parties. We conclude that the proceeding was not brought for the purpose of procuring a construction of the will but was a controversy between the residuary legatee and the annuitant as to which should pay the tax and the fact that the residuary legatee and the executor in this case happen to be the same person does not alter the situation.

Petitioner has cited and relies upon *Fitchie v. Brown*, 19 Haw. 415. The fee there involved was incurred in a case submitted to this court originally upon agreed facts by the executors and the trustee named in the will and the heirs at law of the deceased to procure a construction of the will and instructions to the trustee, a corporation, for its guidance in distributing portions of the estate in its hands, and also to ascertain whether a corporation is authorized to act as trustee in this jurisdiction. The executor was impartial in the matter, the controversy being between the trustee under the will and the heirs at law of the deceased (see *Fitchie v. Brown*, 18 Haw. 52). From the decision of this court an appeal was taken by the heirs at law to the Supreme Court of the United States and after a decision in that court adverse to the contention of the heirs a motion was made by them in this court to have the expense of that appeal, including their attorneys' fees, paid out of the estate. In an opinion disposing of this motion this court held that in a contest concerning the construction of a will it is only under very exceptional circumstances that the estate of a decedent should bear the expense of an unsuccessful appeal from a decree of this court, but on the grounds that the question there involved was novel and important and the amount involved large the

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attorneys' fees incurred in the unsuccessful appeal of the contestants were ordered paid out of the estate.

The decision in that case can have no application to the case at bar for the reason, as we have already stated, this is not a case involving the construction of a will but is rather a controversy between the annuitant and the residuary legatee as to which one should pay the inheritance tax in question and does not come within the general rule which we have announced.

We find no error in the refusal of the circuit judge to tax the estate with the petitioner's attorneys' fee.

The order appealed from is affirmed.

*W. B. Pittman* (*Andrews & Pittman* on the brief) for petitioner.

*B. L. Marx* (*Frear, Prosser, Anderson & Marx* on the brief) for the executor.

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KAHOI KEALOHA *v.* HALAWA PLANTATION, LIMITED, AND HENRY H. PERRY.

No. 1132.

ERROR TO CIRCUIT COURT, THIRD CIRCUIT.

HON. J. W. THOMPSON, JUDGE.

SUBMITTED NOVEMBER 22, 1918.

DECIDED DECEMBER 28, 1918.

COKE, C. J., KEMP AND EDINGS, JJ.

TRESPASS—*quare clausum fregit*—defense under plea of general denial.

It is the law in this Territory that under a general denial a defendant in an action of trespass *quare clausum fregit* may as a defense show title in himself or in one under whom he made entry, and this he may do as fully as though he had interposed the common law plea of *liberum tenementum*.

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DAMAGES—*punitive or vindictive—rule respecting principal and agent.*

Punitive or vindictive damages are not to be allowed as against the principal unless the principal participated in the wrongful act of the agent or expressly or impliedly by his conduct authorized or approved it either before or after it was committed.

TORTS—*liability of codefendants.*

The general rule is that in tort actions the liability of codefendants is several as well as joint and that a new trial may be granted a part of them and the verdict allowed to stand as to others, but where the judgment up to a certain amount is good as to both the defendants and beyond that amount is invalid as against one of them it follows that the judgment can only be sustained in such an amount as was properly assessable against both defendants.

SAME—*same—judgments—remission of damages illegally awarded.*

Where the decision upon which the judgment is predicated specifically distinguishes and separates the illegal portion of the judgment from that portion which is legal the plaintiff may be permitted to remit the illegal portion of the judgment.

## OPINION OF THE COURT BY COKE, C. J.

The defendant in error, plaintiff in the court below and hereafter referred to as plaintiff, instituted an action for damages against the Halawa Plantation, Limited, and Henry H. Perry, plaintiffs in error and hereafter referred to as defendants, the action being based upon alleged trespass *quare clausum fregit*. It is alleged in the complaint that plaintiff was the owner and in possession of a certain tract of land situated at Halawa, district of North Kohala, County of Hawaii, upon which was located his home and dwelling-house; that on the 20th day of July, 1917, the defendants broke into the land of plaintiff, razed and utterly destroyed his dwelling-house, removed the lumber and material thereof and converted the same to the use of the Halawa Plantation, Limited. It is further alleged that numerous fruit and ornamental trees as well as vegetable plants growing upon the land were destroyed. The plaintiff claimed damages in the sum of twelve thou-

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sand dollars. The defendants plead the general issue and appeared and separately defended the action in the court below. The case was tried by the court without the intervention of a jury and upon the conclusion of the hearing a decision was rendered by the judge of the circuit court finding for the plaintiff and against the defendants in the sum of \$1788 actual damages and the sum of \$2000 punitive or exemplary damages, also the costs of court. Upon this decision judgment was entered against the defendants in the sum of \$3788 and costs taxed at \$145. The defendants now bring the cause to this court on a writ of error jointly sued out by them. The defendants have filed separate briefs by their respective counsel and while the judgment is joint and several in its nature the defendants appear to be in entire accord upon all questions presented to this court.

Forty separate errors are specified in the assignment of errors. In view of their great number we will not undertake to discuss each separate error assigned but will confine ourselves to those alleged errors which appear to be chiefly relied upon by the defendants. The alleged errors of the court below, particularly emphasized in the briefs of defendants, may be summarized as follows: (1) Ignoring the question of title to the land and taking the position that title was immaterial; (2) including the value of the house in the damages under the theory that mere possession without title gave the plaintiff a right of action for the value of the house; (3) holding that Perry's acts, done on the occasion in question, were done by him for and on behalf of the corporation; (4) holding that Perry's acts were within the scope of his authority as manager of the plantation; (5) holding it to be immaterial whether the agreement between Perry and Mrs. Bryant for the taking of the lumber was an illegal agreement; (6) holding the principal as well as the agent liable for punitive damages.

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The evidence in the court below tends very strongly to show that Kahoi Kealoha, the plaintiff, is the son of Kealoha, deceased, the original grantee of a tract of land at Halawa, Island of Hawaii, described in grant No. 661; that plaintiff many years ago built a house upon the premises and thereafter resided and made his home therein; that plaintiff for many years had occupied this lot of land, cultivated it and claimed it as his own and also claimed to have paid the taxes assessed against it; that under his claim of ownership he was lawfully in possession thereof on the 20th day of July, 1917; that on that date defendant Henry H. Perry, who at that time was the manager of the sugar plantation owned by the defendant corporation, went to the home of plaintiff accompanied by the head carpenter and several other employees of the defendant corporation and demanded that plaintiff pay him rent for the premises; that plaintiff refused, claiming that the property was his own; that Perry thereupon ordered the plantation men to tear down the plaintiff's dwelling; that plaintiff resisted the attempt to destroy his house and was assaulted by Perry, for which assault Perry was later on convicted by a jury; that after the futile attempts of plaintiff to prevent the destruction of his home and after he had been overpowered, Perry, together with the plantation employees working under his direction, proceeded to tear down the house and loaded the lumber and other material taken from the house in wagons brought for that purpose and conveyed the same to the Halawa plantation where the same was utilized for plantation purposes. The household effects of plaintiff were scattered about the debris of the destroyed building, and fruit and ornamental trees and vegetable plants were trampled upon and destroyed. The plaintiff, however, remained upon the premises taking up his abode in a small shed which had escaped destruction. The plaintiff, who is about



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seventy years of age, was born on the premises and has lived thereon during his entire lifetime. The house was a wooden structure 40x30x18 feet. The value of the house at the time of its destruction was fixed by various witnesses testifying in respect thereto in different amounts varying from \$100 to \$1800.

- The defendant Halawa Plantation, Limited, is a domestic corporation conducting a sugar plantation at Halawa, Island of Hawaii. It is claimed by the defendants that the house and house-lot in question were at the date of the trespass and for about twenty-five years next preceding owned by James Wight, now deceased; that Mrs. Clara G. Bryant was the agent of the trustees of the Wight estate and as such had control of the property of the estate in and about Halawa. It is further claimed by the defendants that Mrs. Bryant had instructed the defendant Perry to go upon the premises in question and take down the dwelling-house thereon. The defendant Halawa plantation contends that defendant Perry was acting wholly without the scope of his duties and employment with the company and that it is in no wise responsible for his acts. Perry claims that he was acting for the agent of the owners of the property and therefore he cannot be held for damages.

The court below found that defendant Perry as manager of the plantation operated by the defendant company entered into an agreement with Mrs. Bryant to take down the house occupied by plaintiff utilizing plantation men and means of transportation and that the plantation was to receive for its services the lumber and other material taken from the house. We do not think it of any importance one way or the other whether, as a matter of fact, the agreement between Perry and Mrs. Bryant for the taking of the lumber was an illegal agreement. It was of course important to ascertain the purpose of this agree-

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ment, and whether what was done pursuant thereto was contrary to the rights of plaintiff. We think that Perry in making the arrangement with Mrs. Bryant was not only acting for the defendant corporation but was acting within the scope of his duties as the manager of its plantation. "While the manager's duties are continuous as regards the course of time of his employment it is likewise true that his duties cover a wide range and are multifarious in character." *Silva v. Kairiki Mill Co.*, 24 Haw. 324, 329.

While it can hardly be disputed that the plaintiff was in lawful possession of the premises at the time of the alleged trespass the defendant Perry has made some effort to show that the title to the premises was in the Wight estate. We conceive it to be the law in this Territory that under a general denial a defendant in an action of trespass *quare clausum fregit*, such as is the present case, may as a defense show title in himself or in one under whom he made entry and this he may do as fully as though he had interposed the common law plea of *liberum tenementum*. "The effect of pleading liberum tenementum is to confess that the plaintiff had possession of the close named generally at the time of the acts complained of, and that such acts were committed by the defendant as set forth, but to avoid the trespass by averring a right to enter and act as alleged." 21 Ency. Pl. & Pr. 840. Of course if it be shown that the plaintiff is in rightful possession of the premises but is not the owner thereof he may still be entitled to recover yet ordinarily the measure of damages would be reduced.

Upon the question of title plaintiff testified that he owned the property and had lived upon it continuously for many years. There is testimony that he claims to have paid the taxes assessed against the premises and his evidence of occupation and claims of ownership are sup-

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ported by the testimony of several disinterested parties. As against this the defendant Perry introduced in evidence R. P. 661 to Kealoha, the father of plaintiff, and offered then for the purpose of identification the purported will of Kealoha, by which it is claimed that the premises now in question were devised to Joseph Kahuhu, and defendant Perry further offered for the purpose of identification a purported deed from Joseph Kahuhu to James Wight. While these two last mentioned documents accompany the record sent up to this court they do not appear to have been identified or introduced as part of the evidence in the case. There is no reference to them in the decision of the circuit court and if it is true, as the condition of the record would indicate, that these documents were never identified and introduced in evidence the trial court was bound to ignore them (see *Halama v. Halama*, 23 Haw. 254; *Tripp v. Duane*, 13 Pac. 860), but even had the will and deed been properly introduced in evidence the description of the property conveyed by them is so meager as to render the documents of little weight in the absence of additional evidence identifying the property which they purport to convey as including that portion of R. P. 661 which was occupied and claimed by plaintiff.

It is not claimed by defendants that James Wight in his lifetime, or those representing his estate after his death, at any time prior to the date of the alleged trespass in July, 1917, ever went into the possession of the premises in question or paid the taxes thereon or exercised any claim of ownership in respect thereto. If, as contended by the defendants, this property was sold to James Wight by Joseph Kahuhu in 1892 that claim is vastly weakened by the fact that for a period of twenty-five years no claim of ownership was ever asserted by Wight or those in charge of the interests of his estate following his death.

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But, say the defendants, the court below entirely ignored the question of title and proceeded upon the theory that possession alone was sufficient to warrant recovery by plaintiff and that the title to the land was not in issue. A reading of the decision of the court below does not bear out this claim. The court's findings in its decision upon this phase of the case are as follows:

"It appears to the court that Kahoi Kealoha, the plaintiff, so far as this action is concerned, and so far as the court is now interested, owned and possessed a certain tract of land, such as described in the bill of complaint. Whether he owned it in fee, or whether he did not own it in fee, the court thinks matters but little so far as this investigation is concerned. There is no question in the court's mind but that he was in possession of this house and lot. Here is an old man, seventy years old perhaps, or almost seventy, born on the premises, who assisted in building this house fifty-four years ago, and who has lived in that house practically all the time since then. Now, numerous witnesses were introduced in an effort to establish his residence somewhere else. Certain discrepancies arose in the testimony, but it is the duty of the court to reconcile these discrepancies if it can. If it cannot be done, then the court must accept such evidence as seems to it the most reliable, and disregard that which seems the most unreliable. The witnesses introduced in an effort to establish the plaintiff's residence at other places than this house in question, were, in the main, of a different nationality, and, to say the least, the evidence of such witnesses was very much of a negative nature. We have the old man's testimony that he lived there all his life. The testimony of the policeman was that the plaintiff lived there thirty years. The testimony of another witness who had lived in the house with the plaintiff for eighteen years, and of another who had lived on the premises for fourteen years; which was positive; with all evidence to the contrary being somewhat negative. But, at least, even those witnesses who knew anything about the occurrence place the old man in possession of this house

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when the alleged trespass was said to have taken place. \* \* \* That being the case, it is unnecessary, at this time, as the court sees it, for the court to say whether or not Kahoi Kealoha had a good and valid title to this property. He was in possession. And the contract having been made and Mr. Perry acting as the agent of the defendant corporation it matters not whether the trustees of the Wight estate had any interest, remote or otherwise, in this property. But the court is asked to pass upon the question of whether or not the trustees of the Wight estate had an interest in this property, and then, upon that, the court's own decision, which would be in the nature of a judgment obiter dictum, the court is asked to decide and pass upon whether or not this plaintiff should be entitled to damages rather than to inure to the benefit of the trustees of the Wight estate; whether or not the plaintiff Kahoi had any title at all, or whether the trustees of the Wight estate had any title at all. \* \* \* In fixing the amount of punitive damages the court took into consideration many other things, but I might mention that here is an old man, practically seventy years of age, somewhat decrepit, living in his own home, his own castle, as he understood it to be. He never had any other home; he was getting too old to have any other home. It was his. And here is a man, the manager of a plantation, who, himself, says he weighs two hundred and seventy pounds, driving onto this old man's premises, \* \* \* And that is not all, for then the old man, in order to hold on to what he thought was his own, and still thinks is his own, lived in an old shed that is still on the premises."

At the very outset in the opinion the court found that the plaintiff is the owner and in possession of the property following which the court expressed the view that it mattered little whether the plaintiff owned the property as long as it was shown that he was in possession thereof. In this last expression the court was undoubtedly in error. We regard this, however, as a harmless error which could not prejudicially affect the defendants. In other words, the measure of damages awarded against the defendants

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could not have been less had the error not been committed. As the evidence stood at the conclusion of the trial the court was warranted in holding, as it did hold, that the plaintiff was the owner and in possession of the premises and that he was entitled to have judgment for the actual damages sustained by him because of the trespass committed by the defendants, and which upon the evidence the court assessed at \$1788. This we cannot say is excessive.

The court below also found against the defendants in the sum of \$2000 for punitive damages. Counsel for the Halawa Plantation, Limited, contend that the company cannot be held liable for punitive damages, even admitting that the trespass was committed by Perry and that he was acting for and on behalf of the company and within the scope of his authority as manager of the plantation. They assert that the limit of the recovery against the company would be the actual damages only.

We think in the light of the evidence in this case the court below was unauthorized to assess punitive damages against the defendant Halawa Plantation, Limited. While the defendant Perry as manager of the company's plantation enjoyed a wide range of authority so far as the conduct of the affairs of the plantation was concerned he is not an officer of the company nor is his status in relation to the company such as to make the company answerable in punitive damages for his acts not expressly authorized or approved or ratified by the company. There is no evidence whatsoever that the plantation company either through its officers or any other person actually wielding the executive power of the corporation directed the trespass or in any way approved thereof after it had been committed. The law respecting punitive damages under circumstances such as are presented in this case is very fully expressed by the Supreme Court of the United

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States in *Lake Shore etc. Ry. Co. v. Prentice*, 147 U. S. 101, where the rule is quoted with approval that "punitive or vindictive damages or smart money were not to be allowed as against the principal unless the principal participated in the wrongful act of the agent, expressly or impliedly, by his conduct authorizing it or approving it either before or after it was committed."

It is not an exaggeration to say that a more high-handed and wanton invasion of the rights of another could hardly be contemplated than was committed by Perry as shown by the record in this case. Without a shadow of legal authority and with wilful and utter contempt for the law and a criminal indifference to his civil obligations he proceeded in force to the home of plaintiff and in modern germanic fashion assaulted plaintiff, tore down his house, destroyed his trees and plants, and carried away the valuable portions of the house leaving plaintiff to exist as best he could amid the wreckage of his former home. But however wicked the servant may have been, where the principal neither expressly nor impliedly authorized or ratified the act the criminality of it is as much against him as against any other member of society.

We think in this case it is quite enough that the company shall be liable in compensatory damages for the injuries sustained in consequence of the wrongful acts of its servant. See *Hagan v. Providence & Worcester Ry. Co.*, 3 R. I. 88, 91; *Sedgwick on Damages* (8th ed.) Sec. 378; *Duncan v. Wilder S. S. Co.*, 8 Haw. 411, 415.

And so having found that so much of the judgment of the court below as is based upon its decision and findings against the defendants for punitive damages in the sum of \$2000 cannot be sustained as against the Halawa Plantation, Limited, we are further of the opinion that under the circumstances of this case the judgment should not be divided, in other words, that the amount thereof can-



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not properly be split up in separate amounts and assessed against the defendants in proportion to their respective liabilities.

The general rule is that in tort actions the liability of codefendants is several as well as joint and that a new trial may be granted to part of them and the verdict allowed to stand as to others. *Washington Gas Light Co. v. Lansden*, 172 U. S. 534; *Albright v. McTighe*, 49 Fed. 817; *I. C. R. R. Co. v. Foulks*, 191 Ill. 57; *Loving v. Commonwealth*, 45 S. W. 773; *City of Kansas City v. File*, 55 Pac. 877; *Moreland v. Durocher*, 80 N. W. 284. But in the present case the judgment up to a certain amount is good as to both of the defendants and beyond that amount is clearly invalid as against the Halawa Plantation, Limited. It therefore follows that if the judgment is to be sustained at all it can only be sustained in such amount as was properly assessable against both defendants.

In view of the fact that the decision upon which the judgment herein is predicated specifically distinguishes and separates the amount found against the defendants for actual damages from the amount found against them for punitive damages, in other words, the illegal portion of the judgment being clearly distinguishable from the legal, we have concluded that if within ten days plaintiff shall file in this court a written consent to remit the damages awarded against the defendants in the sum of \$2000 the judgment of the court below will be affirmed for the balance and will be ordered modified accordingly. Otherwise a new trial must be granted.

All the other errors assigned but not herein specifically discussed have been duly considered and are found without merit.

And it is so ordered.

*Robertson & Olson* for Halawa Plantation, Limited.



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*Frcar, Prosser, Anderson & Marx* for H. H. Perry.  
*Mott-Smith & Lindsay, R. W. Breckons* and *H. L. Holstein* for defendant in error.

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IN THE MATTER OF THE APPLICATION OF MARY  
AH SAM FOR THE SUPPORT OF HER BASTARD  
CHILD.

No. 1087.

ERROR TO CIRCUIT COURT, SECOND CIRCUIT.

HON. W. S. EDINGS, JUDGE.

SUBMITTED DECEMBER 10, 1918.

DECIDED DECEMBER 30, 1918.

COKE, C. J., KEMP, J., AND CIRCUIT JUDGE HEEN IN PLACE  
OF EDINGS, J., DISQUALIFIED.

BASTARDS—*presence of child in court.*

It is not error to permit the child whose paternity is the subject of inquiry to remain in the court room during the trial and to be held on the mother's lap while she is giving her evidence.

TRIAL—*instructions.*

A requested instruction not applicable to the facts of the case is properly refused.

SAME—*same.*

A requested instruction which has been covered by other instructions given in the case is properly refused.

BASTARDS—*judgment—amount, how determined.*

The facts upon which the court determines the amount of the judgment to enter against one who has been found to be the father of a bastard child should be judicially ascertained and disclosed by the record.

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*SAME—same—effect of failure of court to ascertain financial standing of defendant.*

When no error is found in the proceedings before the jury, but the court fails to ascertain the financial standing, etc., of the defendant prior to the entry of judgment fixing the amount defendant shall pay for the support of the illegitimate child, the judgment in that respect will be reversed, but so much thereof as is based upon the verdict will not be disturbed.

## OPINION OF THE COURT BY KEMP, J.

The defendant, James Akina, plaintiff in error, was found by a jury in the juvenile court of the second circuit to be the father of the bastard child of one Mary Ah Sam and the court entered a judgment requiring him to pay to its mother for support, maintenance and education of said child the sum of \$240 per annum in monthly instalments of \$20 each until said child reaches the age of fourteen years. From this judgment the defendant comes to this court on writ of error and assigns five grounds as follows:

“1. That the court erred in allowing the petitioner Mary Ah Sam to bring the bastard child in the court room.

“2. That the court erred in allowing the petitioner Mary Ah Sam to carry her bastard child with her to the witness stand.

“3. That the court erred in refusing to give instruction number 2 requested by defendant-plaintiff in error which was in the following language: ‘The court instructs the jury that if they believe from the evidence in the case that the crime charged against the defendant rests alone on the testimony of the prosecuting witness, Mary Ah Sam, then they should scrutinize her testimony with care and caution.’

“4. That the court erred in refusing to give instruction number 3 requested by defendant-plaintiff in error which said request was in the following language: ‘If after considering all of the evidence in the case, you shall find that the evidence upon any question is equally balanced, you should answer such questions against the party who has

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the burden of such issues, for in such case there would be no preponderance in favor of such proposition.'

"5. That the court erred in ordering defendant-plaintiff in error to pay the sum of \$20.00 per month for the maintenance and support of said bastard child of Mary Ah Sam."

The first two assignments of error raise practically the same question and will be considered together.

The question is, was it error for the court to permit the bastard to remain in the court room in the presence of the jury and to be carried by the mother to the witness stand while testifying? The record discloses that before the selection of a jury to try the case the defendant requested that the child be ordered removed from the court room. This request was denied by the court and the child remained in the court room. After a jury had been selected and sworn, Mary Ah Sam, the mother, was called as a witness and took the stand with her child, a baby two months of age, in her arms, whereupon the defendant objected to the witness taking the stand with the baby. The objection was overruled and the mother permitted to hold the child until it became restless shortly after the examination of the witness began when the court ordered the mother to give the child to some one else to hold. At the close of the evidence for the prosecution the child was offered in evidence for the purpose, as stated by counsel, of corroborating the testimony of the mother that the child was then under six months of age, our statute requiring such cases to be begun within six months of the birth of the child. The defendant's objection to this offer was sustained and the plaintiff was not permitted to exhibit the child to the jury. When the statement was made by counsel that the child was offered to corroborate the testimony of the mother as to its age the court remarked "The child is here and they have seen it," but did not change

## Opinion of the Court.

the ruling which had already been made refusing to permit the plaintiff to exhibit the child to the jury.

The defendant has cited authorities which hold that it is error in a bastardy case to permit the bastard while under two years of age to be exhibited to the jury for the purpose of having the jury make comparison of the complexion, features, etc., of the child with those of the reputed father as evidence of the alleged paternity. *State v. Harvey*, 112 Ia. 416; *Clark v. Bradstreet*, 80 Me. 454; *Risk v. State ex rel Vestal*, 19 Ind. 152; *Reitz v. State*, 33 Ind. 187; *Ingram v. State*, 24 Neb. 33.

There is, however, a diversity of opinion as to whether the child may be exhibited before the jury for their inspection as evidence in the case to show its resemblance to defendant by comparing the features and appearance of the two. Many of the States permit this to be done regardless of the age of the child. *Gaunt v. State*, 50 N. J. L. 490, 14 Atl. 600; *State v. Woodruff*, 67 N. C. 89; *Scott v. Donovan*, 153 Mass. 378, 26 N. E. 871. But we do not find it necessary to express an opinion as to which is the better and sounder doctrine as the record in this case shows that the child was not exhibited to the jury.

In all of the cases cited by defendant the child was exhibited to the jury for the purpose of comparing its appearance, complexion and features with those of the reputed father on the issue of whether he was in fact its father, while in this case the offer of the child in evidence was only for the purpose of corroborating the evidence given by the mother as to the age of the child and was not received even for that purpose. Upon this state of facts the cases cited do not appear to be in point.

In support of the court's action in permitting the child to remain in the court room and be held on its mother's lap during part of the time she was giving her evidence the plaintiff has cited 3 R. C. L. 765-766, from which we quote the following:

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“Irrespective of whether profert may be made of the bastard child to the jury, or testimony of witnesses received as to its resemblance or nonresemblance to the defendant, the mere presence of the child in court is not prejudicial error to the defendant, when no profert of such child is made, or offered to be made to the jury, and no reference to it, or its presence, is made by counsel to the jury. Nor is it ground of objection that the child whose paternity is in question is allowed in its mother’s lap during her examination, at least where the court cautions the jury against considering or discussing any supposed or fancied resemblance or nonresemblance to the defendant; and the child is not tendered in evidence or exhibited to the jury in argument.” See also *Johnson v. Walker*, 86 Miss. 757, 39 So. 49; *State v. Stark*, 149 Ia. 749, 129 N. W. 331; *Hutchinson v. State*, 19 Neb. 262, 27 N. W. 113.

In this case the court did not caution the jury against considering or discussing any supposed or fancied resemblance or nonresemblance to the defendant, but the matter was not called to the attention of the court by a requested instruction and we do not think the defendant can in the absence of such request complain of the court’s action in not so cautioning the jury. The record does not disclose that any reference to the child or its presence was made by counsel to the jury.

We do not think the defendant was prejudiced by the presence of the child in the court room or by the mother being permitted to hold it while giving her evidence and the court’s action in that respect was therefore not error.

Assignments of error numbers 3 and 4 complain of the refusal of the court to give defendant’s requested instructions numbered 2 and 3.

Number 2 was properly refused because it was not applicable to the facts of the case. The establishment of no essential element of the crime charged depended entirely upon the evidence of Mary Ah Sam. There was direct

## Opinion of the Court.

corroboration of every essential part of her testimony and to have given the charge would have been misleading.

Number 3 was properly refused because the points contained in it were fully covered by other instructions given at the request of defendant and by the oral instructions given by the court of its own motion.

Assignment of error number 5 does not relate to proceedings had during the trial before the jury but relates to the judgment of the court rendered upon the verdict of the jury finding the defendant to be the father of the bastard in question. Section 3008 R. L. 1915, defining the duty of the court in entering judgment in a case of this character, provides in part as follows:

“If the accused acknowledge in open court the paternity of such child, or if at the trial the finding of the court or jury be against the accused, the court, in rendering judgment thereon, shall make an order for the annual payment, until the child be fourteen years of age, of such sum of money, in such instalments and in such manner, as shall to the court seem best, taking into consideration the financial standing of the defendant, his income, earning capacity, and those of his family who are dependent upon him for their support, maintenance and education.”

We think the facts upon which the court determined the amount of the judgment to be entered against the defendant should be judicially ascertained and disclosed by the record, otherwise the question of whether the judgment is excessive cannot be determined. The record in this case does not disclose that there was a judicial ascertainment of the income, earning capacity or financial standing of the defendant. This constitutes error which requires a modification of the judgment of the court but we see no reason why the verdict of the jury should be disturbed. In *Gay v. Mendonca*, 7 Haw. 293, by the special finding in the verdict, it was apparent that the jury had disregarded or misunderstood the instructions of the court in

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respect to the measure of damages and a new trial was ordered upon the amount of damages only. If upon a reversal in such a case the new trial can be limited to the amount of damages, the other findings of the jury to stand, we see no reason why the verdict in this case should not stand and the further proceedings be confined to a judicial ascertainment by the court of the earning capacity, income, etc., of the defendant and a modification of the judgment in accordance with the facts thus ascertained by the court.

That portion of the judgment fixing the amount which the defendant shall pay is reversed and the cause remanded with instructions to the court to judicially ascertain the facts which we have found should be so ascertained and to enter a modification of the judgment in accordance with such findings. The judgment in all other respects is affirmed.

*Eugene Murphy* for plaintiff in error.

*E. R. Bevins*, County Attorney of Maui, for defendant in error.

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KAHOI KEALOHA *v.* HALAWA PLANTATION,  
LIMITED, AND HENRY H. PERRY.

No. 1132.

ERROR TO CIRCUIT COURT, THIRD CIRCUIT.

HON. J. W. THOMPSON, JUDGE.

DECIDED JANUARY 6, 1919.

COKE, C. J., KEMP AND EDINGS, JJ.

*Per Curiam*: Kahoi Kealoha, plaintiff and defendant in error, pursuant to leave granted in the decision of this

**Syllabus.**

court made and entered herein on December 28, 1918, having on the 4th day of January, 1919, filed herein his written consent that the judgment herein in his favor and against the Halawa Plantation, Limited, and Henry H. Perry, defendants and plaintiffs in error, be modified and reduced in the sum of \$2000, it is hereby ordered that the cause be and the same is hereby remanded to the court below with instructions to modify the judgment therein by reducing the same in the sum of \$2000 conformably to the views expressed in the said former decision of this court, and in all other respects the said judgment is affirmed.

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**IN RE TAXES W. R. CASTLE.****No. 1126.****APPEAL FROM TAX APPEAL COURT, FIRST CIRCUIT.****SUBMITTED DECEMBER 10, 1918.****DECIDED JANUARY 7, 1919.****COKE, C. J., KEMP AND EDINGS, JJ.****TAXATION.**

The decision of the tax appeal court fixing the value of property will be sustained unless shown to have been erroneous, and the burden of proof is upon the appellant.

**OPINION OF THE COURT BY EDINGS, J.**

This is an appeal from the decision and judgment of the tax appeal court of the first taxation division sustaining the assessment on a certain house and lot owned by the appellant and situate on Tantalus, in this City and County,



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of \$2000 on improvements and \$4000 on the land, as of January 1, 1918.

The petitioner contends that by reason of the almost impassable condition of the road leading up to this place rendering its use and occupation exceedingly inconvenient and at times impossible the assessment is grossly excessive and should be reduced; that the assessor adopted a wrong theory of valuation; that there was no attempt to assess under the statute, as amended, "by the Somer's system or other means of exact computation from central locations," or "on the basis of the value for use and occupation."

Section 1241 of the Revised Laws of 1915 was amended in 1917 by the insertion of the following clause: "Land shall be equally assessed, according to its value for use or occupancy; this value shall be determined in cities and towns or wherever else practicable, by the Somer's system or other means of exact computation from central locations." The act in question does not make any provision for the institution or introduction of the Somer's system of valuation of real estate for the purpose of taxation in this Territory and without some such provision it is not in the power of an assessor to comply with the direction of the statute. Under this system the valuation of real property is done by a committee or committees of citizens composed of taxpayers and it of course dispenses with any tax return on real estate by an individual.

An examination of the record discloses the existence of sufficient evidence to warrant and sustain the decision of the tax appeal court and the appellant has failed to show that it was erroneous. "The decision of that court (tax appeal) should not be disturbed unless good reason appears for doing so." *In re Taxes Waiakea Mill Co.*, 24 Haw. 333, and *In re Taxes Haw. Sugar Co.*, 16 Haw. 236, 238, therein cited and approved. "This court has uniformly held that it does not reduce or increase the valuation made by a tax

## Syllabus.

appeal court which appears to be fair and just." *Tax Assessor v. Wailuku Sugar Co.*, 18 Haw. 422. The presumption is that the decision appealed from is correct. *Hawi Mill & Plantation Co. v. Forrest*, 21 Haw. 389; *In re Taxes Catholic Mission*, 22 Haw. 764. The burden is upon the appellant to show that the decision is erroneous. *Lihue Plantation Co. v. Farley*, 13 Haw. 283.

The findings of the tax appeal court are affirmed and the appeal is dismissed.

*Castle & Withington* for the taxpayer.

*J. Lightfoot*, Deputy Attorney General, for the assessor.

K. AKATSUKA *v.* W. A. McKAY.

No. 1099.

ERROR TO CIRCUIT COURT, FIRST CIRCUIT.

HON. S. B. KEMP, JUDGE.

SUBMITTED DECEMBER 10, 1918.

DECIDED JANUARY 8, 1919.

COKE, C. J., AND CIRCUIT JUDGES DEBOLT AND HEEN IN PLACE OF KEMP AND EDINGS, JJ., DISQUALIFIED.

APPEAL AND ERROR—*verdict based upon weight of evidence.*

This court will not on error reverse a verdict where the record shows that it was based on the credibility of witnesses or the weight of the evidence.

COURTS—*jurisdiction to alter judgment.*

After a court of limited jurisdiction has entered a final judgment in the case the power of the court to alter the judgment has ceased and any attempt to do so would be extrajudicial and without force.

SAME—*power to correct record of proceedings.*

A district magistrate has authority to correct the minutes of

## Opinion of the Court.

proceedings of his court where the same are incorrect before certifying the record to the appellate court.

**SAME—*district magistrates—damages.***

In a case where it does not appear that the magistrate attempted to exercise authority where he had none or attempted to assume jurisdiction where none existed he cannot be required to respond to damages for his acts.

## OPINION OF THE COURT BY COKE, C. J.

This action on the case for damages was instituted by K. Akatsuka, plaintiff and plaintiff in error, against W. A. McKay, defendant and defendant in error, in the circuit court of the first judicial circuit. The plaintiff asked judgment against the defendant in the sum of \$15,000 for actual and punitive damages. The allegations of the complaint may be summarized as follows: That defendant was and is the district magistrate of Wailuku, County of Maui and Territory of Hawaii; that on the 7th day of May, 1916, a police officer filed a complaint charging the plaintiff with the crime of having received stolen goods and that plaintiff was duly arraigned upon said charge before the defendant as district magistrate and entered a plea of not guilty and thereupon without any other proceedings he was sentenced by the magistrate to pay a fine of fifty dollars and to be confined in jail for the period of ten days; that on the following day plaintiff appealed from said judgment and sentence to the circuit court of the second judicial circuit paying costs on appeal of \$1.10; that it was the duty of the district magistrate to keep a record of said cause and that the record so kept showed that the plaintiff did not plead guilty to the charge but after sentence had been imposed and an appeal taken the district magistrate, on May 19, 1916, without notice to plaintiff, fraudulently, maliciously, wantonly and without reason or proper cause altered the record so as to make it appear that plaintiff had plead guilty to such

## Opinion of the Court.

charge and that the district magistrate was justified in the sentence theretofore imposed and for the further wilful, malicious and wanton purpose of defeating a trial by jury of the plaintiff in said cause; that on May 22, 1916, plaintiff filed a motion before said district magistrate to amend the record in said cause so as to show the true facts and happenings in said cause on the 8th day of May, 1916, which motion was denied without the taking of testimony; that on June 1, 1916, plaintiff appealed from the refusal of the district magistrate to make the record in said cause conform to the true facts; that on the 25th day of May, 1916, said cause came on for hearing in the circuit court of the second circuit upon the appeal of the plaintiff last above referred to whereupon the circuit court found and held that the plaintiff had not plead guilty to said charge on the 8th day of May, 1916, and the said circuit court ordered the cause remanded to the district court of Wailuku for the taking of a plea to said charge and for further proceedings according to law; that on the 21st day of June, 1916, plaintiff was again arraigned in the district court of Wailuku and plead not guilty and upon his plea was tried and found not guilty; that plaintiff has expended certain sums of money in the matter of his appeal to the circuit court, the amount of which has not been returned to him. The prayer of the complaint is as follows: "Wherefore, by reason of the wanton, malicious and corrupt actions of the defendant herein in denying to your plaintiff a trial of the charge of having received stolen goods and on which he was arraigned before the defendant herein, then and now district magistrate of Wailuku, County of Maui, Territory of Hawaii, and the failure of the said defendant herein to make a true record of such proceeding and the failure of defendant herein to amend the record in said cause to conform to the facts and the failure of the defendant herein to pay unto your

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plaintiff the sum of \$2.20 paid by plaintiff herein to perfect his said aforementioned appeals, your plaintiff has been damnified in the sum of \$10,000." The foregoing paragraph is followed by another of like tenor alleging punitive damages in the sum of \$5000. The final prayer of the complaint demands judgment against defendant in the sum of \$15,000.

The cause was tried before the second judge of the circuit court of the first judicial circuit, Territory of Hawaii, without a jury, and at the conclusion of the trial the circuit judge rendered a decision finding against plaintiff and in favor of the defendant and judgment accordingly was entered up. The plaintiff comes here on a writ of error and in his petition assigns six errors alleged to have been committed by the circuit court as follows:

"(1) That the court erred in holding that the plaintiff, plaintiff in error, suffered no damage and was not in greater jeopardy than that in which he was originally placed.

"(2) That the court erred in holding that the plaintiff, plaintiff in error, was not entitled to recover the sum of \$1.10, paid by him to perfect his appeal from the refusal of the court to make the record of the district court of Wailuku to conform to the truth.

"(3) That the court erred and in basing his decision upon a private book kept by the district magistrate for his own guidance when the same was not admitted in evidence.

"(4) That the court erred in its conclusions of fact which was the basis of its judgment.

"(5) That the court erred in rendering judgment for the defendant, defendant in error, basing the judgment upon an erroneous and mistaken conception of the use of Hawaiian terms.

"(6) That the court erred in rendering judgment for the defendant, defendant in error, there not being a scintilla of evidence upon which to base said judgment."

We think the case turns chiefly upon the decision of the

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circuit judge holding that the plaintiff entered a plea of guilty when arraigned before the district magistrate upon the criminal charge, for if he did so plead the district magistrate could not be required to respond in damages for altering his record so that the same would correctly recite the proceedings. Upon this point there is a diversity of evidence. The plaintiff, the Japanese interpreter and others testified that the plaintiff's plea was not requested by the magistrate and that none was entered by him. On the other hand the defendant testified that the plaintiff when arraigned plead guilty to the charge and in this he is corroborated, at least to some extent, by Mr. Bevins, the county attorney, who was present in the court room.

The court below determined this issue favorably to the defendant and found that the plaintiff had entered a plea of guilty when arraigned before the magistrate. There being evidence to support the conclusions of the trial court we are unwilling to disturb them. This court has repeatedly held that it will not on error reverse a verdict where the record shows that it was based on the credibility of witnesses or the weight of the evidence. *Hang Fook v. Republic*, 9 Haw. 593; *Pahukula v. Maguire*, 9 Haw. 630. The court below having determined that the defendant entered a plea of guilty when arraigned before the district magistrate it follows that the alteration of the record made by the defendant herein was for the purpose of making the same correspond to the proceedings actually had. There is no doubt that after a court of limited jurisdiction has entered a final judgment in a case the power of the court to alter the judgment has ceased and any attempt to so do would be extrajudicial and without force. Even in a court of general jurisdiction a judgment once entered must stand until modified, vacated or disposed of by some process prescribed by law. There are numerous interesting authorities upon the right of courts to alter their

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records and upon the liability of judges to respond in damages for acts done without jurisdiction. *Randall v. Brigham*, 74 U. S. 523; *Tompkins v. Sands*, 8 Wend. 462; *McCormick Harvesting Machine Co. v. Halvorson*, 11 S. D. 427; *Banister v. Wakeman*, 15 L. R. A. 201; *Foster v. Alden*, 21 Mich. 507. It does not appear that the magistrate at any time attempted to alter the judgment and sentence which he pronounced upon the plaintiff at the time of the arraignment. The alteration in the record was confined to the minutes of the proceedings. The record herein shows that the magistrate had a clerk who kept the record of the proceedings; that after the appeal had been perfected by the defendant the clerk's record of the case was submitted to the magistrate to be certified by him to the appellate court. In scrutinizing the record the magistrate found that the clerk had omitted to insert in the record the plea of guilty entered by the plaintiff and on the following day in open court the magistrate ordered a correction in the record in that respect. The law requires the magistrate to preserve in written detail the minutes and proceedings of trials, transactions and judgments with the substance of the testimony and the facts upon which their decisions rest (Sec. 2308 R. L.), and the practice obtaining in this Territory is, that when an appeal is taken from the district magistrate's court the magistrate or his clerk prepares a copy of the record and the magistrate certifies the same to the appellate court as a full and correct copy of his record in the cause and it would indeed be an anomaly if where the record on appeal prepared by the clerk is presented to the magistrate for his certification and the magistrate finds that it is incorrect he is powerless to make any corrections but must certify it unchanged to the court of appeal. The right of the magistrate to correct his record was recognized by this court in *Ferreira v. Kamo*, 19 Haw. 162; 187 and 317. In

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the present case the magistrate, having knowledge that the plaintiff in error had perfected an appeal, and recognizing, as he must have recognized, that the contemplated alteration in the record might seriously affect the status of the plaintiff in the matter of his appeal, should have notified the plaintiff or his counsel and afforded them an opportunity to be heard prior to making the alteration. But this does not present a case where the magistrate attempted to exercise authority where he had none or attempted to assume jurisdiction where none existed. The most that can be said is that the alteration of the record without notice to the plaintiff was irregular, but for this the magistrate cannot be required to respond in damages.

The third assignment of error is emphasized by counsel for plaintiff. He urges that it was reversible error for the court to use as a basis for its decision the private book kept by the magistrate and which was not admitted in evidence. The only reference to this book appearing in the decision of the court below is the recital that "the memorandum kept by the magistrate has an entry of a plea of guilty evidently made at the time of the arraignment." The book or memorandum was not introduced in evidence but the entry therein was read into the record and entirely bears out the finding of the circuit judge just referred to. In this we see no error.

Finding no error in the record the judgment of the circuit court is affirmed.

*Eugene Murphy* and *Andrews & Pittman* for plaintiff in error.

*J. Lightfoot*, Deputy Attorney General, for defendant in error.



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CATHERINE MACHADO v. T. MITAMURA.

No. 1119.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

HON. S. B. KEMP, JUDGE.

SUBMITTED JANUARY 7, 1919.

DECIDED JANUARY 9, 1919.

COKE, C. J., EDINGS, J., AND CIRCUIT JUDGE HEEN IN PLACE  
OF KEMP, J., DISQUALIFIED.

OPINION OF THE COURT BY COKE, C. J.

This cause was heretofore presented to this court on the exceptions of plaintiff (see *Machado v. Mitamura*, ante p. 224) where a history of the cause, which we deem unnecessary to repeat here, will be found. It is sufficient for the purpose of this opinion to say that the trial in the circuit court resulted in a verdict for plaintiff in the sum of \$1000; that the defendant then moved for a new trial which was granted by the trial court and the verdict of the jury was set aside. Thereupon the plaintiff brought the cause to this court upon interlocutory exceptions allowed by the trial court, one to the decision of the trial court on the motion for a new trial and the other to the order granting a new trial. This court sustained the exceptions to the decision on the motion for a new trial.

The defendant now comes here on a bill of exceptions presenting his exceptions to various rulings of the trial court, to the verdict of the jury and other matters, all of which were presented by the defendant in his motion for a new trial, the granting of which by the court below was reversed by this court. The record in the former case did not disclose upon what ground the new trial was granted hence we were required to review the evidence, the instruc-

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tions, the motion for a new trial, the verdict of the jury, and, in fact, the entire record. This having been done and nothing new now being presented either as a matter of law or of fact it is inconceivable that we should depart from our opinion heretofore rendered.

The exceptions are overruled.

*Andrews & Pittman* for plaintiff.

*J. Lightfoot and Thompson & Cathcart* for defendant.

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THE COUNTY OF MAUI *v.* MARY DO REGO, ET AL.

No. 1062.

ERROR TO CIRCUIT COURT, SECOND CIRCUIT.

HON. W. S. EDINGS, JUDGE.

SUBMITTED DECEMBER 10, 1918.

DECIDED JANUARY 13, 1919.

COKE, C. J., KEMP, J., AND CIRCUIT JUDGE HEEN IN PLACE  
OF EDINGS, J., DISQUALIFIED.

APPEAL AND ERROR—*joinder of co-parties.*

Where a judgment or decree is several and the interests represented by each of the co-parties are separate and distinct from and not adverse to those of the others any party may sue out a writ of error to protect his own interests without joining his co-parties.

JURIES—*challenge to array—trial and determination.*

If the facts alleged in the challenge to the array of jurors are sufficient, if true, to sustain the challenge, the court proceeds to try the truth of the facts alleged, but if the facts alleged present no legal grounds of objection to the jury they may be summarily overruled.

STATUTES—*mandatory—jury commissioners to be of opposite politics.*

A statute which provides that jury commissioners, among other

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qualifications, shall be of opposite politics held to be mandatory and a challenge to an array of jurors drawn by commissioners alleged to belong to the same political party to be sufficient, if true, to invalidate the jury.

OPINION OF THE COURT BY KEMP, J.

This is an action by the County of Maui against Mary do Rego and her husband Antone do Rego, Caroline J. Moniz and her husband Diego Moniz, the Wailuku Sugar Company, Limited, an Hawaiian corporation, Mrs. M. G. Rodrigues, John Garcia, Mrs. Rose Bento and her husband C. P. Bento, Mrs. Mary Schrader and her husband Geo. B. Schrader and Ellen K. Robinson and her husband W. T. Robinson to condemn for public use certain lands owned by said defendants. After alleging a compliance by the board of supervisors of the County of Maui with all the statutory requirements and that the property sought to be condemned for public use is necessary for the opening of a road from the present upper end of Wells street to a road leading to the armory from High street in the town of Wailuku and is sought to be condemned for use as a public road, the petitioner sets out a description of five tracts which constitute the whole of the property sought to be condemned. The fourth tract set out in the petition is alleged to belong to the defendants, plaintiffs in error, Ellen K. Robinson and W. T. Robinson and the ownership of each of the other tracts is alleged to be in some one or more of the other defendants.

The defendant Wailuku Sugar Company, Limited, filed an acceptance of the award of damages made in its favor by the board of supervisors. All other defendants except Ellen K. Robinson and her husband W. T. Robinson failed to appear and answer, were adjudged to be in default and the case proceeded to a trial between the plaintiff and said Ellen K. and W. T. Robinson before a jury. The jury's verdict in favor of the said defendants Ellen K. and W. T.

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Robinson was for the same amount awarded them by the board of supervisors and they have come to this court upon writ of error.

The plaintiff, defendant in error, has suggested in its brief that all necessary parties have not been joined in the writ and that the writ should therefore be dismissed.

In their petition for the writ the plaintiffs in error show that many other persons were joined with them as codefendants but assert that no proceedings were had against said codefendants and no issue went to the jury in regard to said codefendants and that the cause of action was against plaintiffs in error separately and the only issue submitted to the jury was between plaintiff, defendant in error, and them and that the judgment involved herein is only between said parties. These allegations are borne out by the record and make it unnecessary to join the other defendants either as plaintiffs or defendants in error.

“Undoubtedly the general rule is that in cases at law where the judgment is joint all the parties against whom it is rendered must join in the writ of error or the writ will be dismissed.” *Robinson v. Kaae*, 22 Haw. 397, 398.

“The general rule respecting appeals is that co-parties to an action who do not join in the appeal must be served with notice of appeal when their interests are adverse to those of the party prosecuting the appeal.” *Kealoha v. Halawa Plantation*, 24 Haw. 436, 439.

“Where a decree or judgment is several both in form and in substance, and the interest represented by each of the co-parties, plaintiff or defendant, is separate and distinct from that of the others, any party may appeal or sue out a writ of error separately, to protect his own interests, without joining his co-parties in the appeal, and without a summons and severance.” 2 Cyc. 760.

In this case the judgment is several and the interests of the parties omitted from the writ are separate and distinct from and not adverse to those of plaintiffs in error. They were therefore properly omitted from the writ.

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The first assignment of error complains of the overruling of what plaintiff in error designates a plea in abatement, but which is in fact a challenge to the array of jurors alleging "that the jury drawn and empaneled to try said cause is improperly constituted in that the law has not been observed in the matter of the appointment of the commissioners who drew said jury in that D. C. Lindsay, Esq., and Patrick Cockett, Esq., the jury commissioners appointed by this court to draw said jury, were not men well known to be of opposite politics, but were in fact at the time of their appointment, and now are members well known to be of the same politics, to wit, members of the republican party."

Section 2411 R. L. 1915 is in part as follows: "The judge or judges of each circuit court shall, prior to the first day of December of each calendar year, appoint for a period of one year from and after the said first day of December two persons as jury commissioners, who shall be voters of the circuit, well known to be of opposite politics and of good reputation for intelligence, morality and integrity."

When plaintiffs in error presented this plea to the court they offered to prove the allegations contained in the plea,—that is, that both of said jury commissioners are, and were at the time they were appointed jury commissioners, members of the republican party. The court refused to hear evidence and overruled the plea, and in so doing said: "The court can only say that before the names were drawn for the jury and after they had been appointed jury commissioners, some time after this jury was drawn, I myself called Mr. Cockett into my office and asked him if he was a democrat and he assured me then that he was a democrat. Again about two weeks ago Mr. Cockett told me that he had changed from democrat to republican; but that was only within the last two or three weeks."

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If the facts alleged are sufficient, if true, to sustain the challenge, the court proceeds to try the truth of the facts alleged. If the facts alleged present no legal grounds of objection to the jury they may be summarily overruled without any replication thereto being filed. 24 Cyc. 333.

We think the correctness of the court's action in refusing to hear evidence as to the truth of the allegations contained in the challenge depends upon whether the allegations are sufficient to sustain the challenge. If they are sufficient the court should have heard the proffered evidence. If they are insufficient the summary overruling of the challenge constituted no error.

If the provisions of section 2411 R. L. 1915, which we have quoted, are mandatory then the jury commissioners must be well known to be of opposite politics. The challenge in this case denies that the commissioners who drew the jury in question were of opposite politics. The disallowance of a challenge to the array which should have been sustained renders void the trial by a jury selected from such array. 24 Cyc. 333.

The challenge to the array of jurors in this case questions the proper performance of the duty imposed by the statute upon the judge. By the statute the judge is to appoint two persons as jury commissioners who shall be voters of the circuit well known to be of opposite politics and of good reputation for intelligence, morality and integrity. The question is whether this part of the statute is mandatory or directory, whether in appointing jury commissioners the judge must, at the peril of all subsequent proceedings tried before the jury drawn, be sure to appoint men, not only of good reputation for intelligence, morality and integrity, but who are also well known to be of opposite politics.

In *United States v. Ambrose*, 3 Fed. 283, the provision of the Federal statute relating to the selection and em-

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paneling of a grand jury is said to be mandatory but only to the extent that it requires an honest intention to conform to the statute and to carry out its provisions in good faith. Beyond that the court held the statute to be directory. In that case the court was not considering the exact question involved in this challenge. There the defendant was indicted for presenting a false claim against the government. To the indictment he filed a plea in abatement setting forth various grounds why the indictment should be quashed. The grounds set forth related to failures of the jury commissioner, clerk and marshal to properly perform the duties imposed upon them by the statute and alleged disqualification of some of the members of the grand jury which returned the indictment. There was no claim that the jury commissioner was not a proper person or that he did not possess the statutory qualifications. A general demurrer to the plea in abatement was sustained, for the reason as we gather from the opinion that there was no allegation of lack of honesty and good faith on the part of those officers whose acts were complained of.

In *United States v. Chaires*, 40 Fed. 820, the exact question here presented was before the court. The Federal statute provides that the names from which the jury, grand and petit, are drawn shall be placed in the jury box by the clerk of such court, and a commissioner to be appointed by the judge thereof, which commissioner shall be a citizen of good standing, residing in the district in which such court is held, and a well known member of the principal political party in the district in which the court is held, opposing that to which the clerk may belong. (21 Stat. L. 43.) Chaires and others were indicted for violation of election laws. They filed a plea in abatement alleging that the jury commissioner appointed by the court, and who acted in placing the names in the box

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from which were drawn the jurors composing the grand jury finding the indictment against them, is not now, and was not when appointed, a well known member of the principal political party in the district opposed to that political party to which the clerk of the court belongs. The plea alleged no injury or prejudice to the defendant resulting from the facts alleged, and constituting the substance of the plea. A general demurrer to the plea in abatement was sustained. The court in the course of its opinion sustaining the demurrer said:

“The statement of the question, and the nature of the case, satisfies us that the statute in this particular is directory and not mandatory. What is the standard for a citizen in good standing? By what rule is it to be determined who is a well-known member of a political party? Considering that the judge has knowledge, judicial or otherwise, as to the political party of the clerk, by what rule is the judge to determine which is the principal party opposed? Suppose that the clerk is an independent or a prohibitionist? In case of a challenge to the array of jurors, or a plea in abatement, who is to try the issue? All matters and questions come back to the judge. The judge, in the exercise of a sound discretion, under the responsibilities of his office, directed by the statute, passes upon the qualifications of the jury commissioner he appoints, and his action would seem to be final and conclusive, except, perhaps, in the court that can call the judge to account for misbehavior in office. Particularly must this be the case where neither injury nor prejudice nor oppression is apparent nor is averred. \* \* \* The matter presented by this plea is naturally an interesting and tender subject to the court, (one of the judges having made the appointment in question,) and we would be disposed, *ex propria motu*, to suspend ruling on this plea, and direct an issue thereon, and an investigation thereunder, but for the fact, of which we take judicial notice as a part of the history of this and the preceding term, that upon the identical question the court has had and allowed the



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fullest investigation; that the real issue therein was not as to whether the jury commissioner was a democrat, and a known democrat, but whether he was a well-known democrat; and thereafter, upon the evidence, the court has held and decided that the jury commissioner was and is a well-known member of the principal political party in the district opposing that to which the clerk belongs, (*U. S. v. Ewan, ante*, 451;) and a further investigation is not necessary, either for the vindication of the court or the protection of parties" (p. 822).

The reasoning in neither of the cases above considered seems satisfactory to us and we have given them extensive consideration only because they have been cited and confidently relied upon by the parties. We think a correct solution of the question is to be found in a study of the general rules governing courts in determining whether the provisions of a given statute should be held to be directory or mandatory.

"A mandatory provision in a statute is one, the omission to follow which renders the proceeding to which it relates illegal and void, while a directory provision is one the observance of which is not necessary to the validity of the proceeding. Whether a particular statute is mandatory or directory does not depend upon its form, but upon the intention of the legislature, to be ascertained from a consideration of the entire act, its nature, its object, and the consequences that would result from construing it one way or the other." 36 Cyc. 1157.

It must be conceded that in the ordinary case it could make but little, if any, difference to litigants whether the jury commissioners who select the jurors for the court belong to one or the other political party, so long as they act honestly and in good faith perform their duties, but the legislature undoubtedly had some object in view when the statute in question was enacted and if its provisions are held to be merely directory that object will be defeated

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and the statute rendered wholly nugatory at the whim of the judge.

“Getting rid of a statutory provision by calling it directory is not only unsatisfactory, on account of the vagueness of the rule itself, but it is the exercise of a dispensing power by the courts, which approaches so near legislative discretion that it ought to be resorted to with reluctance, only in extraordinary cases, where great public mischief would otherwise ensue or important private interests demand the application of the rule.” *Koch & Dryfus v. Bridges*, 45 Miss. 247, 258.

A court should rarely take upon itself to say that what the legislature has required is unnecessary. It may not see the necessity of it, still it is not safe to assume that the legislature did not have a reason for its enactment, and when the requirements of a statute are plain and positive, the courts are not called upon to give reasons why it was enacted.

The statute under consideration is plain and positive in its provision that the jury commissioners shall be “voters of the circuit, well known to be of opposite politics.” The plea alleged that the commissioners who drew the jury before whom the case at bar was tried were not then nor at the time of their appointment of opposite politics but were in fact both members of the same political party and an offer was made to prove the allegations of the plea, which offer was by the court refused. We think the provision of the statute requiring the commissioners to be of opposite politics is mandatory and that the allegations of the plea were sufficient to sustain the challenge. It was therefore error for the court to refuse to hear evidence as to the truth of said allegations.

The conclusion we have reached upon the assignment of error discussed renders it unnecessary for us to consider the remaining assignments. We think, however, that we

## Syllabus.

should call attention to certain defects in the judgment. The judgment entered herein disposed of nothing except the amount of compensation the defendants should receive but does not condemn their land. It is simply a money judgment in favor of the defendants against the plaintiff and does not secure to the plaintiff the things for which the action was brought. In the event of another trial resulting in the condemnation of the land in question the judgment should be so drawn as to protect the interests of all parties.

The judgment is reversed and the cause remanded for further proceedings consistent with this opinion.

*Eugene Murphy* for plaintiffs in error.

*E. R. Bevins*, County Attorney of Maui, for defendant in error.

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TERRITORY v. ALFRED FERNANDEZ.

No. 1072.

EXCEPTIONS FROM CIRCUIT COURT, SECOND CIRCUIT.

HON. W. S. EDINGS, JUDGE.

SUBMITTED DECEMBER 10, 1918.

DECIDED JANUARY 18, 1919.

COKE, C. J., KEMP, J., AND CIRCUIT JUDGE HEEN IN PLACE  
OF EDINGS, J., DISQUALIFIED.

SEDUCTION—*promise of marriage—corroboration.*

In a prosecution for the offense of seduction under section 3902 R. L. 1915 the testimony of the female of the promise of marriage, alleged to have been made to her by the defendant prior to the sexual act, must be corroborated by evidence either direct or circumstantial.

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~~SAME—same—same—presumption.~~

The testimony of the prosecutrix to the effect that just prior to the act of sexual intercourse on the 5th day of May, 1917, the defendant had promised to marry her is not corroborated by other evidence that in July, 1917, the defendant declared his intention to be married the following Christmas. Presumptions do not run backward; they are not retroactive.

## OPINION OF THE COURT BY COKE, C. J.

The defendant, Alfred Fernandez, was indicted, tried and convicted of the offense of seduction and now seeks a review by exceptions of the proceedings had in the circuit court.

We deem it necessary to discuss but one of the several exceptions brought here by the defendant. Section 3902 R. L. 1915 provides: "Whoever by conspiracy or by wilful falsehood or deceit, or under promise of marriage, seduces, causes or procures any unmarried female to commit fornication shall be punished," etc. The indictment presents "that Alfred Fernandez—at Paia in the County of Maui, Territory of Hawaii, on to-wit the 5th day of May, 1917, by wilful falsehood and deceit and under promise of marriage did seduce and cause one Mary Abreu, an unmarried female person, to commit fornication, and did then and there and thereby commit seduction."

The evidence in this case was sufficient to prove that both the prosecutrix and the defendant were unmarried persons. The evidence and the admission of the defendant conclusively establish the act of sexual intercourse, as alleged in the indictment, on the 5th day of May, 1917. The prosecutrix testified that prior to the act she was importuned by the defendant under the promise of marriage to have sexual intercourse with him and that she yielded by reason of his promise of marriage. This the defendant denied.

It is now urged by the defendant that his conviction

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was contrary to the law and the evidence because the testimony of the prosecutrix respecting the promise of marriage, claimed by her to have been made prior to the sexual act, was uncorroborated. Section 3903 of the Revised Laws provides that "no person shall be convicted of rape, seduction or abduction, upon the mere testimony of such female uncorroborated by other evidence direct or circumstantial." In *Territory v. Capitan*, 23 Haw. 771, this court, discussing the various elements of the crime of seduction which under the provisions of the foregoing statute required corroborating evidence, adopted the doctrine that supporting or corroborating evidence is necessary to establish the promise of marriage and the carnal connection. So far as we have been able to ascertain in every instance where a statute such as our own has been interpreted by the courts it has been uniformly held that the promise of marriage made by the defendant prior to the act of sexual intercourse must be corroborated by evidence direct or circumstantial. The only evidence introduced by the prosecution in this case which can in the remotest degree be deemed corroborative of the testimony of the prosecutrix respecting the alleged promise of marriage made to her by the defendant prior to the act of sexual intercourse on May 5, 1917, is the testimony of the father of the prosecutrix, Antone Abreu. This witness testified that in the month of July, 1917, he had a conversation with the defendant in which he asked defendant his intentions toward his daughter (the prosecutrix) and to which the defendant replied, "he was (I am) going to get married this Christmas coming." While this conversation was with respect to the relations between the defendant and the prosecutrix it is to be noted that the defendant did not say that he intended to marry the prosecutrix. But conceding that it was proper to infer from the language used by defendant that his intention then was to marry the prosecuting

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witness yet this conversation took place some two months after the commission of the alleged offense and the defendant was only expressing the intentions which he entertained at the time of the conversation. There is nothing to indicate that the defendant did not in fact first resolve to marry the prosecutrix upon the very day of the alleged conversation. It is a presumption of law that when the existence of a thing is once established by proof the law presumes that the thing continues to exist as before until the contrary is shown or until a different presumption arises from the nature of the subject in question. But presumptions do not run backward; they are not retroactive. It cannot legally be presumed that because the defendant in July expressed his intention to marry that he entertained the same intention or made any promises in respect thereto two months prior to that date. The evidence of the defendant's declaration of his intention to get married made in July is devoid of probative value to corroborate the testimony of the prosecutrix of the promise of marriage made to her by defendant on the 5th of May of the same year.

The proof of the promise of marriage being insufficient to support the verdict the exceptions must be sustained and a new trial granted. And it is so ordered.

*E. R. Bevins*, County Attorney of Maui, for the Territory.

*Eugene Murphy* for defendant.

Syllabus.

TERRITORY v. A. M. CABRINHA.

No. 1150.

RESERVED QUESTIONS FROM CIRCUIT COURT, FOURTH CIRCUIT.

HON. C. K. QUINN, JUDGE.

SUBMITTED JANUARY 2, 1919.

DECIDED JANUARY 21, 1919.

COKE, C. J., KEMP AND EDINGS, JJ.

INDIOTMENT—*accused as witness before grand jury.*

It is not sufficient ground to quash an indictment that the indicted person was subpoenaed to appear and did appear and testify before the grand jury as to matters material to the offense charged in the indictment, when it appears that he was informed of his right to refuse to answer any question the answer to which in his opinion might tend to incriminate him.

OPINION OF THE COURT BY KEMP, J.

(Coke, C. J., dissenting.)

On the 27th day of August, 1918, A. M. Cabrinha, a member of the board of supervisors of the County of Hawaii, was indicted for alleged violations of section 168, R. L. 1915.

The defendant has filed a motion to quash said indictment alleging "that the said A. M. Cabrinha was required by a subpoena to appear on the 26th day of August, 1918, before the said grand jury as a witness while the said indictment and the charges of violation of section 168 of the Revised Laws of Hawaii therein contained were pending before the said grand jury, and while they were inquiring into said charges and considering the question whether they would find the said indictment to be a true bill; and that he, the said A. M. Cabrinha, did appear in obedience

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to said subpoena and was sworn and examined and required to testify and did testify to matters and things relating to, and material to, the charges made in the indictment against him, and in each and all of the counts thereof; this without having been informed or having knowledge that the grand jury had under consideration any matter involving a criminal charge against him, the said A. M. Cabrinha."

The facts were tried upon the affidavits of defendant and the foreman of the grand jury from which the circuit judge has found and certified the facts substantially as follows: That on August 23 the said A. M. Cabrinha was subpoenaed to appear before the grand jury on August 26 as a witness; that in response to said subpoena he did so appear on said August 26, whereupon he was sworn as a witness, after which and before he was interrogated he was advised by the deputy attorney general in the presence of the grand jury that the grand jury desired to ask him certain questions concerning matters then under investigation by said grand jury, and further that if any question should be propounded to him, an answer to which, in his opinion, might tend to incriminate him in any way he might refuse to answer such question; that the deputy attorney general thereupon propounded to him, in the presence of the grand jury, certain questions and in response thereto he made statements as to the business of Cabrinha & Company named in said indictment, and as to the ownership of said business and the names of the partners and persons pecuniarily interested in the business transacted by said firm, said matters and things relating to and being material to the charges made in said indictment; that testimony as to these matters had previously been given by other witnesses; that at the time of his examination as a witness he did not know and was not informed that his own conduct was under investigation;



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that he did not request an opportunity to consult an attorney but answered all questions without objection, except one, the nature of which is not disclosed, which he refused to answer on the ground that an answer thereto might tend to incriminate him.

The circuit judge believing that it is in the interest of justice that the questions of law presented by the facts upon said motion shall first be determined by this court has reserved the following questions:

(1) "Should an indictment be quashed when it appears that the defendant was compelled by subpoena to attend before the grand jury, and give material testimony, without knowing that his own conduct was under investigation?"

(2) "Upon the facts found by the trial court, as above set forth, should the motion to quash the indictment be granted?"

The first question is not sufficiently comprehensive to make an answer to it of value in this case and is therefore returned unanswered. However, an answer to the second question is all that is necessary to apprise the circuit judge of the law applicable to the facts before him.

The question is, are the above facts sufficient to vitiate the indictment? This question involves that portion of the Fifth Amendment to the Constitution of the United States which provides: "Nor shall any person \* \* \* be compelled in any criminal case to be a witness against himself."

Our first concern is to determine whether under the circumstances of this case the defendant was "compelled," as that term is used in said amendment, to be a witness against himself, or was his testimony voluntarily given? If he was compelled to be a witness against himself his constitutional right was invaded and the indictment which resulted from his so being compelled is invalid and should

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be abated, while if he voluntarily gave evidence against himself he has no just cause of complaint. Whether one has been compelled to be a witness against oneself must be determined in each case from the facts of that case. It certainly would not be seriously contended that being subpoenaed and appearing before the grand jury was a violation of this constitutional right, nor his being sworn before that body, nor testifying upon any matter that did not tend to incriminate him even though he was "compelled" in all of these particulars. All of these things the law compels him, in common with other citizens, to do. Up to the point then where the interrogation of defendant as a witness on the matters of which he complains began nothing took place which could be said to have violated his constitutional right and if he, after being advised, as he was, of his right to refuse to make self-incriminating answers, gave his testimony voluntarily and without objection, no matter how incriminating it was, no constitutional guarantee was invaded by the proceeding. Immunity from compulsion in the matter of becoming a witness against oneself is a personal privilege which may be waived as may any other personal privilege.

"It is well settled that a witness cannot claim his constitutional privilege until he is sworn. He must take the oath, so that his assertion of privilege shall be made under that sanction." *United States v. Kimball*, 117 Fed. 156, 163.

From the fact that one cannot claim one's constitutional privilege until after taking the oath it necessarily follows that the constitutional privilege cannot until that time be violated. It cannot be violated before it can be invoked. Compulsion, then, does not arise from the summoning, swearing and examination of the witness on matters which do not tend to incriminate him.

It will now be considered whether the additional facts,

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that the witness did not know at the time of his examination that his own conduct was under investigation and made self-incriminating statements without objection after being fully advised of his rights in the matter, will render his statements involuntary and vitiate the indictment.

It is not contended that the defendant was not advised of his right to refuse to make self-incriminating statements or that he raised any objection to answering any of the questions of which he now complains. The complaint is that he did not know and was not advised that his conduct was the subject of investigation and that he, therefore, cannot be held to have given his testimony voluntarily.

In the case of *United States v. Edgerton*, 80 Fed. 374, cited by defendant and confidently relied upon in support of his proposition that one cannot be said to have acted voluntarily who gave his testimony without knowing that his own conduct was under investigation it does not appear that the defendant was advised of his right to refuse to give self-incriminating evidence. This fact robs the opinion in that case of any particular application to the case at bar where the defendant when called before the grand jury was fully advised of his right to refuse to give self-incriminating evidence. What effect then, if any, should be given to the fact that the defendant was so advised? From 22 Cyc. 423, we quote the following:

“An indictment will be quashed where defendant was called to testify before the grand jury as to the matter from which it resulted, without knowing or being informed that his own conduct was under investigation, and although such is not a statutory ground for quashing the indictment. But where defendant has been advised of his right to decline to answer upon the ground of self-incrimination it has been held that his voluntary testimony is not ground for quashing.”

In support of the last sentence of this text the case of

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*State v. Donelon*, 45 La. 744, 12 So. 922, is cited in the foot note and defendant has undertaken to avoid the force of the text and said decision by pointing out that the defendant in that case knew when he appeared before the grand jury that his own conduct was under investigation and that the case does not therefore support the text. It is true that the defendant in that case must have known at the time he testified before the grand jury in a general way, although he was not told, that his own conduct was under investigation, since it appears that at the time he was incarcerated in jail under an accusation pending against him and several others in the recorder's court for the same offense, without benefit or bail. But regardless of whether the text is supported by the authority cited we regard the rule there announced as sound.

We do not think the fact that the defendant was not told before giving his testimony that his own conduct was under investigation rendered his testimony involuntary since he was advised of his right to refuse to answer any question the answer to which in his opinion might tend in any way to incriminate him. He must be assumed to be a man of ordinary intelligence and to be able to differentiate between statements which would and those which would not tend to incriminate him. Had he known that his own conduct was under investigation how could that knowledge have aided him in determining whether or not his answer to any given question might have a tendency to incriminate him? When he was advised of his right to refuse to answer he was placed on his guard and if he failed to avail himself of his privilege he must be deemed to have waived it and to have testified voluntarily, hence his constitutional privilege was not invaded.

"In all cases where a personal privilege exists for a witness to testify or not, if such witness does testify without objection he will be deemed to have done so voluntarily. How could there be compulsion or legal restraint, when

## Dissenting Opinion of Coke, C. J.

there was no law which could compel Lauder to testify to criminating matters against himself, or punish him for refusing to testify?" *People v. Lauder*, 82 Mich. 109, 119, 120.

The first question is returned not answered and the second question is answered in the negative.

*J. Lightfoot*, Deputy Attorney General, for the Territory.

*J. W. Russell* and *W. H. Smith* for defendant.

## DISSENTING OPINION OF COKE, C. J.

The affidavit of the defendant herein shows and it was found and is certified by the circuit court to be a fact that at and during the examination the defendant was wholly ignorant of the fact that the charges in the indictment were being inquired into by the grand jury. The subpoena requiring the defendant to appear before the grand jury does not contain the slightest intimation of the nature of the investigation being conducted. There are instances where the subpoena, the nature of the questions propounded or other circumstances should clearly indicate to a person of ordinary intelligence that his own conduct was under scrutiny. In such a case it would perhaps be unnecessary to advise the witness of the nature of the investigation, as also where the witness is a lawyer it might not be deemed necessary to advise him of his constitutional right to refuse to give self-incriminating evidence. But in the present case the record conclusively shows that the defendant was not aware of the nature of the investigation. It appears that the questions propounded to defendant while before the grand jury had to do with the business of the firm of Cabrinha & Company and particularly respecting the names of persons having pecuniary interests therein. This information might have been required by the grand jury in an inquiry in which the conduct of the defendant was in no way connected. Under

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these circumstances it was not sufficient to merely advise the witness of his right to refuse to make self-incriminating statements but in addition thereto he should have been advised that his conduct was under fire in order that he might determine whether or not his answers to the questions propounded would tend to incriminate him.

In the case of the *United States v. On Tai*, 3 U. S. Dist. Ct. Haw. 491, the defendant prior to his indictment was subpoenaed by the grand jury and conducted before it by the United States marshal. After the witness was sworn he was advised by the United States attorney that he need not answer any questions if he did not want to and that he had a right to refuse to answer all questions. He then gave self-incriminating evidence and was subsequently indicted. Thereafter he moved to quash the indictment upon the same grounds as are presented in the case at bar. In the opinion in that case, which was written by a former chief justice of this court, the indictment was sustained although the procedure was severely criticized. But, as contradistinguished from the present case, the court there found from the evidence of the defendant and from the fact that the property of the Federal government which it was alleged he unlawfully purchased from a soldier was taken from his house at the time he was subpoenaed and was exhibited before him in the grand jury room, that he was aware of the nature of the inquiry being conducted by the grand jury. The court said, "I do not hesitate to express my disapproval of the calling of the defendant in this case before the grand jury under the circumstances shown.

\* \* \* But, having been sent for, the fact that his conduct was being investigated should have been clearly explained to him and, to have been absolutely fair, an opportunity should have been given him to consult with counsel even though he was not entitled to the assistance of counsel as he would be if on trial. But in view of the fact that

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he had a general idea of the subject of investigation, derived from the surrounding circumstances, and must have known that he was at least under some suspicion in connection with the alleged purchase of clothing and that he was, as he admits, fully advised of his right to refuse to answer questions it can hardly be said that he was compelled to give evidence against himself." The court in that opinion quotes with approval the language employed in *United States v. Kimball*, 117 Fed. 156, where the rule is laid down "that where the acts or conduct of a particular person who is under suspicion are being inquired into and that person is called as a witness he should be apprised of the fact that he is under fire and advised as to his right to refuse to answer questions which may tend to incriminate him." The maxim *nemo tenetur seipsum accusare* had its origin in a protest against the inquisitorial and manifestly unjust methods of interrogating accused persons which had long obtained in Continental Europe and which until the expulsion of the Stuarts from the English throne in 1688 and the erection of additional barriers for the protection of the people against the exercise of arbitrary power was not uncommon in England. The celebrated trial of Sir Nicholas Throckmorton and Udal, the Puritan minister, made the system so odious as to give rise to a demand for its total abolition. The change in the English criminal procedure in that particular seems to be founded upon no statute and no judicial opinion but upon a general and silent acquiescence of the courts in a popular demand. But however adopted it has become firmly imbedded in English as well as American jurisprudence. So deeply did the iniquities of the ancient system impress themselves upon the minds of the American colonists that the States with one accord made a denial of the right to question an accused person a part of their fundamental law so that a maxim which in England was a mere rule

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of evidence became clothed in this country with the impregnabilities of a constitutional enactment. It has found engraftment into the various state constitutions and was written by the people of the Union through the medium of James Madison into the Federal Constitution. It secures a right of personal liberty which Congress itself cannot revoke and which no court should attempt to withhold. Any attempt to extort from a witness evidence for the purpose of indicting him for a criminal offense is a proceeding which cannot abide the pure atmosphere of political liberty and personal freedom.

In the majority opinion it is held that the case of *United States v. Edgerton*, 80 Fed. 374, does not apply here because in that case it does not appear that the defendant was advised of his right to refuse to give self-incriminating evidence. That question was not before the court in the *Edgerton* case and no point was made of it. The decision is based solely upon two points, first, respecting the presence in the grand jury room of a person who it was claimed had no right there, and second, "that the defendant was required by a subpoena to appear before the grand jury as a witness and that he did appear in obedience to such subpoena and was sworn and examined and required to testify to matters and things relating to and material to the charge made in the indictment against him and this without being informed or having knowledge that the grand jury had under consideration any matter involving a criminal charge against him." And the court in passing upon the second ground presented used the following clear and emphatic language: "*It is fatal to the indictments that the defendant was called to testify in the particular matter from which they resulted without being informed or knowing that his own conduct was the subject under investigation.*"

I cannot conceive of language more clearly applicable



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to the case at bar. The defendant in this case was subpoenaed and in obedience to the subpoena appeared before the grand jury and gave evidence. The circuit court certifies that he was wholly ignorant of the fact that the charges in the indictment were being inquired into by the grand jury and upon the evidence of the defendant, together with other evidence, an indictment was returned against him charging him with the crime. The opinion in *Edgerton* case, so far as I am aware, has never been overruled. In fact it has been favorably commented upon and adopted by courts of other jurisdictions. See *State v. Faulkner*, 175 Mo. 546, 610, 611. The court of general sessions in New York in dealing with the same subject in *People v. Haines*, 1 N. Y. S. 55, also held that a defendant called before a grand jury should be informed of the charge against him. See also *People v. Singer*, 18 Abb. N. C. 96. The authorities uniformly hold that rights conferred by constitutional grant must have broad and liberal construction and application.

The majority opinion, while recognizing the necessity of advising a witness of his constitutional privilege to refuse to give self-incriminating evidence, denies him the right to know the nature of the inquiry. The latter I think is equally as essential as the former, for how can a witness determine whether his evidence may or may not incriminate him if he be in total darkness as to the matter under investigation.

In my opinion the motion to quash should be granted. The cause can then be resubmitted to another grand jury free from any violation of the constitutional rights of the defendant.

## Syllabus.

ROSE S. REYNOLDS *v.* CHARLES A. REYNOLDS.

No. 1136.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

HON. C. W. ASHFORD, JUDGE.

SUBMITTED JANUARY 7, 1919.

DECIDED JANUARY 23, 1919.

COKE, C. J., KEMP AND EDINGS, JJ.

EQUITY—*pleading.*

A married woman cannot sue her husband in equity without the interposition of a next friend.

## OPINION OF THE COURT BY EDINGS, J.

(Kemp, J., dissenting.)

The matter comes before this court upon the respondent-appellant's appeal from an order of the circuit judge allowing the complainant-appellee the sum of sixty dollars per month as temporary maintenance pending the determination of a suit for separate maintenance brought by her, or until the further order of the court.

It appears that upon the 20th day of September, A .D. 1918, Rose S. Reynolds instituted a suit in equity in her own name against Charles A. Reynolds, her husband, for separate maintenance, to which suit respondent-appellant interposed a demurrer setting up and relying upon the following ground of objection: "That the above petitioner, Rose S. Reynolds, cannot maintain an action for maintenance against said respondent, Charles A. Reynolds, in her own name, said parties being husband and wife," and also upon the ground that "The return was sufficient to apply to the bill of complaint and contained facts sufficient to show cause why the order should not have been made."

The demurrer was heard by the circuit judge and by him overruled.

## Opinion of the Court.

The first ground of demurrer is that a wife cannot sue her husband in equity without suing by a next friend. At common law, owing to the identity of husband and wife, neither can sue the other; but, in equity, when the wife's claims are adverse to her husband's, she by her next friend may sue her husband and likewise the husband may sue the wife. Where a state court decreed a divorce *a mensa et thoro* between man and wife allowing alimony to the latter, and the husband moves out of the state for the purpose of placing himself beyond the jurisdiction of the court, "the wife can sue by her next friend in a court of the United States, having equity jurisdiction, to recover the amount of alimony decreed by the state court." *Barber v. Barber*, 62 U. S. 582. The doctrine laid down in this case seems to have been generally followed by the courts of the several States and we see no sufficient reason to induce us to depart from it. As remarked by Chief Justice Marshall in *Crockett v. Lee*, 20 U. S. 522, in considering a question of equity practice, "The hardships of a particular case would not justify this tribunal in prostrating the fundamental rules of a court of chancery; rules which have been established for ages on the soundest and clearest principles of general utility." The general rule in equity is that a *feme covert* has no right to file a bill in equity against her husband without the interposition of a next friend. *Wood v. Wood*, 2 Paige (N. Y.) 454; 10 Ency. Pl. & Pr. 197. The statute in this Territory upon this subject, so far from relaxing this rule confirms it, for section 2954 R. L. 1915 provides that "A married woman may sue and be sued in the same manner as if she were sole; but this section shall not be construed to authorize suits between husband and wife."

The order of the circuit judge overruling the demurrer upon this ground is reversed and the cause is remanded for further proceedings consistent with this opinion.

## Concurring Opinion of Coke, C. J.

We do not consider the second ground of exception well taken, being a question of fact in the discretion of the trial judge whose ruling upon the same is not final and may be rescinded upon a trial of the cause in the lower court.

*C. C. Bitting* for complainant.

*Thompson & Cathcart* for respondent.

## CONCURRING OPINION OF COKE, C. J.

I concur in the opinion of Mr. Justice Edings but confess that I entertain little sympathy for the rule announced upon the first ground of demurrer. It is a rule based upon the fiction of complete unity of husband and wife and because of which they cannot contract with or sue each other since a person cannot make a contract or bring a suit against himself. In some of the States this obsolete fiction has been abolished by statute, thus emancipating both spouses from its consequences. This, however, has not been done in Hawaii. In fact the ancient rule denying a wife the right to sue her husband in a court of equity, unless she does so through the medium of a next friend, is expressly retained by section 2954 R. L. 1915. I fail utterly to comprehend the wisdom of the rule which while permitting a wife to directly maintain an action against her husband for divorce *a vinculo* and for alimony looks upon her as *non sui juris* and denies her the right to sue him for separate maintenance unless through the interposition of a *prochein ami*, but in every jurisdiction where it has not been expressly abolished by statute the rule has the uniform sanction of the courts as well as of the text writers. 21 Cyc. 1512, 1517; 10 Enc. Pl. & Pr. 197; Fletcher, Eq. Pl. & Pr. 21; Story's Eq. Pl. (6th ed.), Sec. 61, p. 61; *Barber v. Barber*, 21 How. (62 U. S.) 582, 589, 590; *Lewis v. Elrod*, 38 Ala. 17; *Bridges v. McKenna*, 14 Md. 258; *Walter v. Walter*, 48 Mo. 140; *DeWall v. Corenhoven*, 5 Paige 581; *Thomas*

## Dissenting Opinion of Kemp, J.

v. *Thomas*, 18 Barb. 149; *Wood v. Wood*, 2 Paige 454; *Ward v. Ward*, 17 N. C. 554.

The demurrer of respondent-appellant should, in my opinion, be sustained. The complainant-appellee may, of course, if she so desires, apply to the court below for permission to amend her bill by inserting the name of a responsible person as her next friend.

## DISSENTING OPINION OF KEMP, J.

I am unable to agree to the holding that section 2954 R. L. 1915 does not relax the general rule that a *feme covert* cannot file a bill in equity against her husband without the interposition of a next friend.

The statute provides that "a married woman may sue and be sued in the same manner as if she were sole; but this section shall not be construed to authorize suits between husband and wife."

The wife has authority to bring a suit against her husband for separate maintenance without statutory authority therefor (*Dole v. Gear*, 14 Haw. 554), but in the absence of statutory authority the suit would have to be brought through a next friend just as would the wife's suit against any other person in the absence of such a statute.

If the statute contained only the first clause there could be no question that this suit could be maintained by Mrs. Reynolds in her own name, because up to that point the statute in plain and unequivocal language authorized a married woman to sue and be sued in the same manner as if she were sole — that is, it authorized her to bring suits in her own name which prior to the statute she could bring only when represented by a next friend. It did not create any new cause of action in her favor nor did it deprive her of any she already had. This much I say is plain if the statute had ended with the first clause. What then was the effect of adding that this section shall not be

## Syllabus.

construed to authorize suits between husband and wife? It is well known that the right of the husband and wife to sue each other does not extend to every character of suit or action but is extremely limited. I think that the legislature out of an abundance of caution added the last clause to make sure that the bars were not thrown down so as to permit general litigation between husband and wife, and there was no intention to except out of the first clause such suits as a wife is authorized to bring against her husband. The legislature simply did not want to be understood as creating any new causes of action in favor of the wife against the husband or the husband against the wife and added the last clause to make sure of that effect.

In my opinion the circuit judge did not err in overruling the demurrer and his action in that respect should be sustained.

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PETER HOLIONA, DANIEL DAMIEN, ABLE LANGSI,  
HANAKAHI KAOPUA, LOUIS HOKUANA, WIL-  
LIE HOKUANA, JULIA POLIKAPU, DAVID  
HOKUANA AND JOHN HOKUANA *v.* KAMAI,  
ALSO KNOWN AS AND CALLED KAMAI KILA,  
KILA AND AH FAT.

No. 1093.

MOTION TO DISMISS.

ARGUED JUNE 12, 1918.

DECIDED JUNE 14, 1918.

COKE C. J., QUARLES, J., AND CIRCUIT JUDGE ASHFORD IN  
PLACE OF KEMP, J., ABSENT.

The defendants in error moved to dismiss the appeal and writ of error of plaintiffs in error "for the reason that

## Opinion of the Court.

although more than twenty days have elapsed since the issuance of the writ of error herein, the necessary papers have not been filed." The petition for a writ of error was filed by plaintiffs in error on May 2, 1918, accompanied by assignments of error and a bond and on the same day a writ of error was issued out of this court. On June 4, 1918, the defendants in error interposed their motion to dismiss. Plaintiffs in error secured an order from a circuit judge directing the stenographer to prepare and furnish a transcript of the evidence. Neither the transcript nor the record in the case has been filed in this court nor has any application been made to this court or any justice thereof for further time within which to file the same. Mr. Vincent, of counsel for plaintiffs in error, presents an affidavit in which he attempts to justify the failure to furnish the transcript of evidence and which might warrant this court in overlooking the delinquency in that regard, but aside from the transcript no reason is given either in the affidavit or in the oral presentation of the matter which justifies or attempts to justify the failure to file with this court the pleading and other necessary papers within twenty days after the issuance of the writ of error. Paragraph 2 of Rule 1 of this court provides, "If the necessary papers are not filed in this court within twenty days after the issuance of a writ of error, perfecting of an appeal or allowance of a bill of exceptions or such further time as may be allowed by this court or a justice thereof the appeal may be dismissed for want of prosecution."

*Per Curiam.* The plaintiffs in error offering no excuse for having ignored the rule the motion is granted and the appeal and writ dismissed.

*E. R. Bevins* submitted the motion without argument.

*E. Vincent* contra.

## Syllabus.

PETER HOLIONA, DANIEL DAMIEN, ABLE LANGSI,  
HANAKAHI KAOPUA, LOUIS HOKUANA, WIL-  
LIE HOKUANA, JULIA POLIKAPU, DAVID HO-  
KUANA AND JOHN HOKUANA *v.* KAMAI, ALSO  
KNOWN AS AND CALLED KAMAI KILA, KILA  
AND AH FAT.

No. 1123.

EXCEPTIONS FROM CIRCUIT COURT, SECOND CIRCUIT.  
HON. L. L. BURR, JUDGE.

ARGUED DECEMBER 10, 1918.

DECIDED JANUARY 30, 1919.

COKE, C. J., KEMP, J., AND CIRCUIT JUDGE HEEN IN PLACE  
OF EDINGS, J., DISQUALIFIED.

JUDGMENT—*power to set aside after term.*

The rule that a court cannot set aside or alter a final judgment after the expiration of the term at which it was entered is modified by statute (Sec. 2442 R. L. 1915) to the extent that it may set aside its judgment provided a motion for a new trial is filed within ten days without regard to whether that period ends before or after the expiration of the term.

APPEAL AND ERROR — *writ of error — exception — rule where both are attempted.*

Where a writ of error which sought a review of certain rulings was dismissed in this court without being considered on its merits a review of the same rulings may be had by exceptions subsequently perfected.

SAME—*nunc pro tunc order.*

Notwithstanding an order is made *nunc pro tunc* the time within which a bill of exceptions may be presented to the judge for allowance runs from the date the order was actually made.

TRIAL—*prima facie showing.*

Where plaintiffs made out a *prima facie* case and the defendants offered no evidence and made no effort to controvert the evidence of the plaintiffs the verdict should be for plaintiffs.



## Opinion of the Court.

## OPINION OF THE COURT BY KEMP, J.

This is an action to quiet title to certain real estate in which plaintiffs claimed an undivided one-half interest. To the complaint filed by plaintiffs the defendants Kamai and Kila filed an answer of general denial and the defendant Ah Fat answered that he is in possession of a portion of the premises in question under a lease from William Hopeau, the owner of said premises when said lease was made.

Trial was had at the October, 1917, term before a jury and resulted in a verdict and judgment in favor of the defendants. The verdict was returned October 31, 1917, and judgment was entered November 7, 1917. On November 10, 1917, plaintiff filed a motion for new trial on the grounds (1) that the verdict was contrary to law and (2) that the verdict was contrary to the evidence and weight of evidence produced at the trial. Other grounds were assigned which have been abandoned. The October 1917 term of the court adjourned without day November 8, 1917, two days prior to the filing of the motion for new trial. The motion for new trial was orally overruled on the 16th day of April, 1918, to which the plaintiff excepted and on June 5, 1918, a written decision and order overruling the motion for new trial was filed as of April 16, 1918, and a written exception thereto filed on June 15, 1918. The bill of exceptions was also filed June 15, 1918, and the defendant suggests that the exception should not be considered on the merits for the reason (1) that more than ten days elapsed between the overruling of the motion and the filing of the bill of exceptions, (2) that the ruling excepted to has been before the court on writ of error and (3) that the motion for new trial was filed after the expiration of the term at which the cause was tried and judgment rendered.

We will consider these questions in inverse order.

In the absence of a statute providing otherwise the gen-

## Opinion of the Court.

eral rule is that a court cannot set aside or alter a final judgment after the expiration of the term at which it was entered, unless the proceeding for that purpose was begun during the term. *United States v. Mayer*, 235 U. S. 55, 67. There are certain exceptions to this general rule not necessary to consider in connection with this case. Our statutory section (2442 R. L. 1915) is in part as follows: "The filing, within ten days, after verdict, judgment or decision, of a motion for a new trial and a bond conditioned for the payment of all costs of the motion in case it is not sustained and that the moving party will not to the detriment of the opposite party remove or otherwise dispose of any property he may have liable to execution, shall operate as a stay of execution until the motion is decided."

By this statute we think the inability of the court to set aside its judgments, except where proceedings for that purpose were begun during the term, was removed to the extent that it may now set aside its judgments provided a motion for new trial is filed and the requirements as to bond are complied with within ten days after the verdict, judgment or decision complained of without regard to whether the ten days allowed expires before or after the expiration of the term.

The second ground assigned as to why the exception should not be considered is not well taken for the reason that the writ of error which sought to review the ruling complained of in this exception was dismissed in this court without being considered on its merits. The ruling has not been reviewed by this court and the fact that the ruling now complained of constituted a ground for the writ of error which was dismissed affords no reason for not reviewing the ruling on exception.

The first ground assigned as to why the exception should not be considered is likewise overruled.

An appeal filed prior to the filing of the decree appealed

## Opinion of the Court.

from is premature although an oral order of like purport had been made prior thereto. *Sumner v. Gear*, 20 Haw. 219. The same would be true of a bill of exceptions presented for allowance prior to the entry of the judgment or order to which the exceptions related. If the bill of exceptions could not be presented to the judge for allowance until the order complained of was actually entered it would manifestly be unjust to hold that the *nunc pro tunc* order had the effect of fixing the date from which to calculate the time in which it should be presented. This same subject was before the supreme court of the United States in *Rubber Co. v. Goodyear*, 6 Wall. 156. In that case the decree was made on December 5, 1866, but was entered as of November 28, 1866, but, said the court, "this circumstance did not affect the rights of parties in respect to appeal. Those rights are determined by the date of the actual entry or of the signing and filing of the final decree."

The final question in the case is whether the motion for a new trial should have been granted on the ground that the verdict of the jury is contrary to the evidence. It is claimed by the plaintiffs that the property in question, which is situated at Hamakuapoko, Island of Maui, was formerly owned by one Hopeau; that Hopeau died in the year 1913 and left surviving him as his heirs at law the plaintiffs herein, who are his brothers and the children of deceased brothers, and the defendant Kamai, his widow. The defendant Ah Fat is the lessee of the premises holding under a lease executed by Hopeau prior to his death and his rights are recognized by all the parties concerned.

The only controversy in the trial of the cause in the court below was as to whether the plaintiffs are heirs of Hopeau, deceased. If so they would of course inherit one-half of his property and the widow would inherit the other half. The evidence introduced on the part of the plaintiffs

## Opinion of the Court.

clearly established, at least to the extent of a *prima facie* showing, that the plaintiffs are the brothers and nephews and nieces of Hopeau and as such are entitled to one-half of the property of his estate. No evidence whatsoever was introduced on behalf of the defendants and it appears to us that as the case stood at the time it was submitted to the jury plaintiffs were entitled to a verdict in their favor. We think that plaintiffs might well have requested and received at the hands of the court a directed verdict in their favor, but the omission upon their part to move for a directed verdict did not impair their right to have a verdict favorable to them where the evidence clearly proved their case and defendants had offered no evidence and made no attempt to controvert the evidence of the plaintiffs. See *Brown v. Braymer*, 16 Haw. 548.

The verdict of the jury was contrary to the evidence and the exception to the order overruling the motion for a new trial is sustained.

*Enos Vincent* (*D. H. Case* with him on the brief) for plaintiffs.

*E. R. Bevins* for defendants.

SOUZA *v.* SAO MARTINHO SOC'Y., 24 Haw. 643. 643

**Syllabus.**

ELIZA CABRAL SOUZA AND BELINA CABRAL  
JAGOE *v.* SOCIEDADE DE SAO MARTINHO  
BENEFICENTE DE HAWAII, AN HAWAIIAN  
CORPORATION.

No. 1139.

SUBMISSION UPON AGREED STATEMENT OF FACTS.

ARGUED JANUARY 23, 1919.

DECIDED JANUARY 30, 1919.

COKE, C. J., EDINGS, J., AND CIRCUIT JUDGE DEBOLT IN  
PLACE OF KEMP, J., ABSENT.

ADOPTION—*adults—statute.*

The adoption of adults is not authorized by statute in this Territory.

OPINION OF THE COURT BY EDINGS, J.

The agreed case submitted to this court shows *inter alios* that one Manuel Caetano Baptista, now deceased, married the mother of the plaintiffs when they were both infants of tender age; that he was a member of the defendant society in good standing when he died; that on April 25, 1917, a short time before his death, he filed in the circuit court of the first circuit of this Territory his petition praying that the adoption of the plaintiffs be authorized, legalized and declared valid. They were at this time of the ages of forty-two and thirty-six years respectively. The petition was granted and the decree prayed for was duly made by the judge of the circuit court. Soon thereafter the deceased died. By the by-laws of the defendant society when a member in good standing dies a death benefit is payable to certain relatives. Chapter 5 of the by-laws of the defendant society contains the fol-

## Opinion of the Court.

lowing provision: “ \* \* \* the board of directors shall pay” the death benefit to the relatives in the order following: “1. To the widow; 2. To the children, legitimate or legitimated” (Articles 2 and 3).

The plaintiffs as children of the deceased claim the said death benefit. The defendant society’s principal claim is that the plaintiffs were not children of the deceased for the reason that the circuit court or judge had no jurisdiction to legalize the adoption by the deceased of the plaintiffs, they being at the time of the decree adults.

While it is true that adoption in its legal sense was unknown to the common law and is a creature of statute in the several states, the majority of which based their statutes upon the civil law, it is beyond question that Hawaii was an absolute monarchy independent of and uncontrolled by the laws of any country. “He (the King) is the sovereign of all the people and all the chiefs. The kingdom is his. \* \* \* He shall be the Chief Judge of the Supreme Court.” Constitution of 1840, Kamehameha III. That adoption in the broadest sense was practiced among the Hawaiians from very remote times is incontrovertible and most probably was derived from the mammalian instinct, although at times it appears to have been resorted to for the purpose of evading some public duty. “If any parent have five, six or more children, whom they support, \* \* \* then those parents shall by no means be required to pay any poll, land or labor tax until their children are old enough to work, which is at fourteen years of age. \* \* \* But it shall not be proper for any man to adopt the child of another for the purpose of avoiding the labor tax. He may, however, adopt the children of his deceased relations and friends, when the children are thus left orphans.” Laws of Kamehameha III, 1839, Fundamental Law of Hawaii, p. 17.

In the case of the *Estate of Nakuapa, deceased*, 3 Haw.

Opinion of the Court.

342, among the claimants appeared Kaaoaopa, who claimed the estate as an adopted daughter of Nakuapa, alleging that the adoption was made before any law requiring adoption to be made in writing. The court says: "It is unnecessary to give a detail of evidence in relation to the custom and usage which prevailed in relation to adoption, prior to the written law, for it is admitted that it was a very general custom among the people. \* \* \* Our statute of inheritance declares that property shall be divided equally between the intestate's children. We regard an adopted child as included in this general term." In the case of the *Estate of Kamehameha IV*, 2 Haw. 715, Robertson, J., says: "He (Prince Alexander Liholiho) was entitled as the adopted son of Kamehameha III to inherit the remainder of the estate" subject to the dower rights of Queen Emma.

While it has been held in several of the states that a statute providing for the adoption of children without any limitation expressed by such words as "minors, infants," etc., or any words which would logically indicate that the intention of the legislature was to confine the adoption to minors, such statute would be construed to authorize the adoption of adults, we are unable to discover any decision which holds that the word "child," as used in these statutes, would be construed to include an adult where the language of the statute indicates that the intention of the law-making power was to confine it to minors. An examination of the laws develops the fact, in our opinion, that there never was a law in force in Hawaii providing for adoption which did not, at least by inference, confine the word "child" to minors. In chapter XXI, Laws of Kamehameha III, dated April 24, 1841, we find the following: "It is a great misfortune for children not to be well taken care of. \* \* \* It is well for the law also to aid the parents in taking care of their children. \* \* \*

## Opinion of the Court.

If parents wish to commit their child to the care of another, it is well for them to go before an officer, and make their agreement in writing and he being a witness to the correctness of the transaction and signing his name as such, the writing shall be legal. If there is no writing or no officer sign his name, the child cannot be transferred." Fundamental Law of Hawaii, pp. 72, 73. The next enactments on the subject are those of 1846 as follows: "It shall be competent to parents to consent in writing, and in the presence of a judge, to the adoption of their children by any suitable third party; but in that case the terms of the adoption must be definitively stipulated in the agreement, and must not be a beneficial consideration to the parents, but to the child, satisfactory to the judicial officer acknowledging the adoption. All such acts of adoption shall be recorded by a notary public as in and by the fifth part of this act provided." Stat. of Hawaii 1846, Ch. 1, Pt. IV, Sec. 3. "It shall be incumbent upon all adopters of children, pursuant to the Fourth Part of this Act, within thirty days after such adoption, to transmit the written act and terms of such adoption to the said principal notary public at Honolulu, to be by him enregistered at the expense of the adopter \* \* \* in default of which such act of adoption shall be void and of no effect." Stat. of Hawaii 1846, Ch. 2, Art. 3, Pt. V, quoted in *Abenela v. Kailikole*, 2 Haw. 660 (1863), also referred to in *Wei See v Young Sheong*, 3 Haw. 489 (1873), and *Black v. Castle*, 7 Haw. 273 (1888).

The language of these laws clearly and logically points to the conclusion that a minor child was exclusively intended. And as these laws were the only written laws authorizing adoption in Hawaii up to the time of the enactment of Act 47, Session Laws of 1915, the adoption of an adult is not authorized by statute in this Territory. These laws of Kamehameha III were never repealed up to 1915.



Opinion of the Court.

but were especially preserved together with other laws by an article of the constitution of 1852 of Kamehameha III. "All laws now in force in this Kingdom shall continue and remain in full effect until altered or repealed by the legislature," a similar provision being inserted in every constitution of Hawaii.

The next statute upon the subject is section 853 Civil Code of 1859 providing that "The said Justices (of the supreme court) shall severally have power at chambers to \* \* \* legalize the adoption of children," which is followed by section 853 Compiled Laws of 1884 as follows: "The said Justices shall severally have power at chambers to \* \* \* legalize the adoption of children," while section 883 Compiled Laws of 1884 provides that "The several circuit judges throughout the Kingdom shall be, and they are hereby empowered, to certify and legalize the adoption of children in the same manner with the Justices of the Supreme Court." The next legislation upon this subject is contained in section 1853 Civil Laws of 1897 providing that "All \* \* \* agreements of adoption, shall, in order to their validity, be recorded in the office of the Registrar of Conveyances, in default of which no such instrument shall be binding to the detriment of third parties, or conclusive upon their rights and interests." The next reference to adoption is in section 1648 R. L. 1905, providing that "Circuit judges \* \* \* shall have power at chambers \* \* \* to legalize the adoption of children," while section 2994 R. L. 1915 provides that "An adopted child, whether adopted by decree or judgment of a judge or court, or by an agreement of adoption legalized by a judge or court, or by an agreement of adoption duly acknowledged and recorded according to law, shall inherit estate undisposed of by will from its adopting parents \* \* \*." The foregoing is a re-enactment of Act 83 Session Laws of 1905. Act 47 Session Laws of 1915, approved April 6, 1915, pro-

## Opinion of the Court.

vides: "Section 1. Any proper person not married, or a husband and wife jointly, may petition a judge of the circuit court of the circuit in which they reside, or a judge of the circuit court of the circuit in which the child resides for leave to adopt a minor child not theirs by birth, and for a change of the name of such child. A written consent must be given to such adoption by the child, if of the age of sixteen years, and by each of his or her living legal parents who is not hopelessly insane, habitually intemperate, or has not abandoned such child for a period of six months, or has not voluntarily surrendered the care and custody of such child to another for a period of two years or over, which fact \* \* \* shall be found by the judge at the time of hearing the petition and such finding noted in the order. If the parents are unknown or have so abandoned or surrendered said child, such consent to adoption shall be signed by the legal guardian of such child \* \* \*." "Section 2. If the judge is satisfied of the ability of the petitioner to bring up and educate the child properly \* \* \* he shall make an order setting forth the facts and declaring that from that date, to all legal intents and purposes, such child is the child of the petitioner and that its name is thereby changed." "Section 3. All laws and parts of laws in conflict herewith are hereby repealed, and the proceedings herein set forth for the adoption of minors shall supersede all other methods of adoption heretofore legal."

The effect of this act is to repeal the only laws existing in this Territory authorizing the adoption of children and prescribing and providing a procedure therefor and as the same was in full force and effect at the time of the decree of adoption of the petitioners by the circuit judge such adoption was entirely unauthorized by law and is null and void.

As this decision disposes of the entire controversy we

## Syllabus.

do not conceive it to be necessary to dwell upon the other question.

*W. J. Robinson* for petitioners.

*Andrews & Pittman* for respondent.

## CONCURRING OPINION OF COKE, C. J.

I am in accord with the conclusion reached in the majority opinion. I base my concurrence, however, solely upon the effect of Act 47 S. L. 1915, which I think necessarily confines adoption proceedings in this Territory to minors. The opinion herein overruled *Souza v. Lusitana Society*, 24 Haw. 396. The error there would not have occurred but for the failure of counsel to call to the attention of the court the existence of Act 47 S. L. 1915, by virtue of which section 2994 R. L. 1915 was repealed.

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IN THE MATTER OF THE ESTATE OF NELLIE  
SPITZ, DECEASED.

No. 1144.

APPEAL FROM CIRCUIT JUDGE, FIFTH CIRCUIT.  
HON. L. A. DICKEY, JUDGE.

ARGUED JANUARY 27, 1919.

DECIDED FEBRUARY 6, 1919.

COKE, C. J., EDINGS, J., AND CIRCUIT JUDGE ASHFORD IN  
PLACE OF KEMP, J., ABSENT.

EXECUTOR AND ADMINISTRATOR—*distribution*.

An administrator is not authorized to distribute an estate except in conformity with the order of distribution unless he acts under clear and specific instructions of an heir at law with full and complete knowledge of her rights and her distributive share in the estate.

## Opinion of the Court.

*SAME—same—contempt.*

Contempt proceedings lie against an administrator to compel him to distribute an estate in conformity with the order of distribution made on his petition for discharge.

## OPINION OF THE COURT BY EDINGS, J.

This is an appeal by Mary Ann Fountain, an heir at law of Nellie Spitz, deceased, from an order and judgment of the circuit judge of the fifth circuit court of this Territory. The facts of the case as disclosed by the record transmitted to this court may be summarized as follows: That the said deceased, Nellie Spitz, died intestate leaving property in this Territory and leaving her surviving a widower, C. W. Spitz, and a sister, Mary Ann Fountain, the petitioner-appellant herein; that the said C. W. Spitz, the widower of said deceased, was by the circuit court of the fifth circuit, and the judge thereof at chambers in probate, on the 30th day of November, 1915, duly appointed administrator of the estate of the said Nellie Spitz, deceased, and that he duly qualified as such administrator and assumed the duties of said office; that on the 23d day of October, 1916, the said administrator filed in said court his petition for the allowance of his accounts, the termination of his trust and the distribution of said estate and upon the same day filed in said court his final account as such administrator charging himself with \$1975 and asking to be allowed the sum of \$54.50, leaving a balance in his hands as such administrator of \$1921.50; that upon the 25th day of November, 1916, said court approved said accounts and adjudged that the persons entitled to said estate were Mary Ann Fountain and C. W. Spitz and that "each of said above heirs shall be entitled to one-half of the property now remaining in the hands of said administrator," and that said administrator deliver over to said person the property remaining in his hands "and do file with this court proper receipts therefor" and that "this order so

## Opinion of the Court.

far as discharge and cancellation of bond are concerned take effect from the date of the filing of said receipts;" that upon the 14th day of March, 1918, the said Mary Ann Fountain filed in the circuit court of the fifth circuit her petition, reciting her relationship to the deceased and the appointment of the said C. W. Spitz as administrator of said estate and the amount of money received by him as such administrator, and alleging that by virtue of the laws of this Territory petitioner is entitled to one-half of the property of said deceased, and that said "C. W. Spitz, although demand has been made on him for the same, after it became due \* \* \* has wholly and completely failed, refused and neglected to pay to this petitioner one-half of the said amount of \$1975, or any other sum of money with the exception of \$200, which was paid to your petitioner on or about the second day of December, 1915;" that the said C. W. Spitz never at any time informed or advised petitioner that she was entitled to one-half of said estate but led petitioner to think that he was making a personal gift of said \$200 from her sister's estate; that petitioner was ignorant of said estate and all proceedings had thereupon and prays that said C. W. Spitz be cited to show cause why he should not be adjudged guilty of contempt of court in refusing to obey the order of the court directing him to pay one-half of the estate in his hands to petitioner. Whereupon on said 14th day of March, 1918, an order to show cause was issued out of said circuit court, directed to said C. W. Spitz, administrator, requiring him to appear before said court and show cause why he should not be punished for contempt for having neglected and failed to carry out the order of the court. Thereafter the said C. W. Spitz filed his return to said order to show cause, stating that he was duly appointed administrator of the estate of Nellie Spitz on or about November 30, 1915; "that he has paid unto the petitioner her share in full out

## Opinion of the Court.

of the said estate as her receipt on file herein will show, which is made a part hereof," which receipt is as follows: "\$965.75 Received from C. W. Spitz, Administrator Estate Nellie Spitz, this 2nd day of December, 1916, my one-half portion of the property of the above deceased. Mrs. Maryan Fountain."

Upon a hearing had upon the 2d day of May, 1918, the court found from the evidence adduced, in substance, that the administrator received the sum of \$1975 and paid out \$54.50 leaving a balance of \$1921.50; that the final order of distribution directed that one-half of this sum be paid to petitioner; that the deceased left no will, "but a little while before her death talked with Mrs. Fountain and others about her wishes, and a week before she died gave a detailed statement to her foster daughter, Emma Armitage (child of Mrs. Fountain), which was written down by Mrs. Armitage. A few days after the death of Mrs. Spitz the relatives talked this over together and they all agreed that the wishes of Mrs. Spitz as to her property should be carried out." "These wishes were, as reported by Mrs. Armitage to the family, that Mr. Spitz should have \$1500., Mrs. Emma Armitage \$1000., Mrs. Rachel Cockett (daughter of Mrs. Fountain) \$200., and Mrs. Fountain \$200." "No one told Mrs. Fountain that by law she was entitled to half the money left by her sister." "After Mr. Spitz was appointed administrator he paid to Mrs. Fountain, Mrs. Armitage and Mrs. Cockett the sums as directed by Mrs. Spitz and agreed at the family conclave." "In his final accounts however he did not report this." "He told Mrs. Fountain that he needed her receipt to get his discharge and that it included money paid to Mrs. Armitage and Mrs. Cockett. Mrs. Fountain testifies that she signed it thinking it was a receipt for \$200." "And I find as fact that she did know this" and "I find that Mrs. Fountain directed the administrator to pay all of her distributive

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share except \$200 to her daughters Emma and Rachel to carry out the request of the decedent; that Mr. Spitz made these payments as directed and that in signing the receipt Mrs. Fountain, with full knowledge of what had been done ratified this and is bound by her receipt," and "I find the respondent not guilty of contempt," from which order an appeal was duly perfected to this court.

Upon the hearing Mrs. Fountain, the petitioner, testified that she only received from the administrator two hundred dollars in a check, as her share of her sister's estate; that she signed the receipt (above set forth) supposing that it was for two hundred dollars; that she did not know anything about the amount of money in the estate; that "three months after her sister's death, in the early part of December, he (Mr. Spitz) called me over to his house, he passed the check and he said 'this is what Nellie left you' and the check was taken up by my husband to be changed at the bank;" that prior to the payment of this two hundred dollars she did not have any talk about it. The witness was then shown a list which was subsequently introduced and marked defendant's exhibit No. 2, but as this list was not included in the record transmitted to this court we are unable to determine its contents. "I thought it was the two hundred dollars that I was signing, I didn't see the other figures." "Mr. Spitz said you better sign that." "Three months after I received the two hundred dollars Mr. Spitz came to me with the receipt to sign." The testimony of Mr. Kaeo, a witness for the respondent, is: That he wrote the receipt for Mr. Spitz; that he asked Mr. Spitz "what was the portion coming to Mrs. Fountain, he told me he didn't know;" that witness looked up the record and put the figures \$965.75 on the left hand corner of the receipt. Mrs. Armitage, a witness for respondent testifies: "I talked to my mother (Mrs. Fountain) about the list after the funeral at my house. My mother, my father, Mr. Spitz and my-

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self were present. My mother said 'carry out the wishes of my dead sister.' " "We talked about the one thousand dollars to me in the sanatorium." Mr. Spitz testifies: "Mrs. Fountain said: 'Charley carry out my dead sister's wishes, everything will be all right.' Everything was satisfactory and everything was with the approval of Mrs. Fountain." "I followed the instructions shown by the memorandum." "I gave Mrs. Fountain \$200 on the 11th December 1915," and "I said at that time the two hundred dollars to you, one thousand is going to Emma out of that money according to the request of my wife which we agreed upon at Manoa." "She didn't say anything. I couldn't make out anything what she said but that she agreed." "I gave her (Mrs. Fountain) two hundred dollars, to Rachel Cockett two hundred dollars and the balance \$960 to Mrs. Armitage." "After I was appointed administrator I drew the money out of the estate and made those payments." "I did not think it was necessary to make any accounting to the court of what I had done with the estate if 'Mrs. Fountain tells me to carry out my wife's wishes.' "

We are forced to the conclusion that the evidence in this case does not warrant or support the decision arrived at by the circuit judge. It was the duty of the administrator to have complied with the order of distribution. Voluntary payments to distributees without an order or decree of court authorizing the same are made by the representative at his own peril. 18 Cyc. 631. The heir, Mrs. Fountain, was entitled to know fully and clearly the exact amount the administrator had in his hands for distribution. This amount was concealed from her by the administrator for at the time of the payment to her of the \$200 he alone knew the amount of money in the estate, he not even having filed in the court any account or other statement which would indicate it. For the purpose of making distribution an administrator is unquestionably a trustee for the heirs. Fidelity is always required of executors



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and administrators in the performance of their duties and the utmost good faith is exacted of them in all their transactions in regard to the estate.

The entire transaction and the acts of the administrator in this case were unauthorized and illegal and to the prejudice of the heir and we feel constrained to and do hereby set aside the order of the circuit judge purging the administrator of contempt and we remand the case to the circuit court with instructions to require the said C. W. Spitz, administrator, to be adjudged guilty of contempt unless he forthwith pay unto Mary Ann Fountain, the petitioner, the sum of seven hundred sixty and 75/100 dollars (\$760.75) with interest thereon at six per cent, from the 25th day of November, 1916.

*C. S. Davis* (*G. A. Davis* and *Fred Patterson* with him on the brief) for petitioner.

*E. K. Aiu* (*A. G. Kaulukou* on the brief) for respondent.

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THE FIRST TRUST COMPANY OF HILO, LIMITED,  
v. A. M. CABRINHA.

No. 1151.

MOTION TO DISMISS.

ARGUED JANUARY 27, 1919.

DECIDED FEBRUARY 6, 1919.

COKE, C. J., EDINGS, J., AND CIRCUIT JUDGE ASHFORD IN  
PLACE OF KEMP, J., ABSENT.

STIPULATIONS.

The responsibility devolving upon this court to require the observance of its rules is secondary to its duty to maintain the integrity of stipulations entered into between counsel and approved by and filed with the court.

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## OPINION OF THE COURT BY COKE, C. J.

This cause is up for consideration upon the motion of plaintiff-appellee, signed by Messrs. Carlsmith & Rolph, its attorneys, to dismiss the bill of exceptions of defendant-appellant heretofore perfected to this court. The record discloses that on April 11, 1918, a judgment was rendered against the appellant and in favor of the appellee for the restitution of a certain lot of land situated at Hilo, Hawaii, and for costs; that on April 30, 1918, plaintiff's bill of exceptions was allowed by the circuit judge; that although no extension of time was thereafter allowed by this court or any justice thereof the record on exceptions did not reach this court until December 7, 1918.

The motion to dismiss was filed herein on January 8, 1919, the appellee invoking in support of its motion the rule of the supreme court which provides that "if the necessary papers are not filed in this court within twenty days after the issuance of a writ of error, perfecting of an appeal or allowance of a bill of exceptions or such further time as may be allowed by this court or a justice thereof the appeal may be dismissed for want of prosecution." See subsection 2 of Rule 1, Rules of the Supreme Court. On December 24, 1918, there was filed in this court a stipulation between the parties hereto whereby it was agreed that the appellant might have up to and including the first day of February, 1919, within which to file his brief. This stipulation was also signed by Messrs. Carlsmith & Rolph, attorneys for appellee, and by J. W. Russell, attorney for appellant, and was submitted to and approved by the chief justice of this court. An affidavit of the clerk of the fourth circuit court was presented in support of the motion and a counter-affidavit was made and filed by the attorney for the appellant, the latter affidavit attempting to justify the delay in transmitting the record to this court.

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It is clearly apparent from the record that there has been a flagrant disregard of the rules of this court by the appellant and were it not for the presence in the record of the stipulation above referred to which granted to appellee up to and including the first day of February, 1919, within which to file his opening brief we would not hesitate to dismiss the bill of exceptions. Indeed, this court, in the absence of motion by appellee, would be fully warranted in taking that action *ex propria motu*. The rules of the supreme court are provided for the convenience, guidance and protection of all those having business before it and any attempt to ignore or evade the rules should be summarily checked. *Holiona v. Kamai, ante*, p. 636. But the responsibility devolving upon this court to require the observance of its rules we conceive to be secondary to its duty to uphold and maintain the integrity of stipulations entered into between counsel and approved by and filed with the court. The effect of the stipulation filed herein was to condone as between the parties any and all prior delinquencies and irregularities and to justify counsel for appellant in confidently assuming that he might proceed to prepare and file his brief within the time specified. To now grant the motion would be to permit counsel for appellee to defeat the very purpose of their written compact. It would entail the approval of a course of conduct which ought to be condemned and would tend to lower the standard of ethics which should prevail among the members of an honorable profession.

The motion to dismiss the bill of exceptions is denied.

W. W. Thayer for the motion.

W. L. Stanley contra.

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C. Q. YEE HOP *v.* JOHN F. COLBURN AND FOOTING, ALIAS AKANA.

No. 1104.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

HON. W. S. EDINGS, JUDGE.

ARGUED JANUARY 30, 1919.

DECIDED FEBRUARY 14, 1919.

COKE, C. J., CIRCUIT JUDGE DEBOLT IN PLACE OF KEMP, J., ABSENT, AND CIRCUIT JUDGE HEEN IN PLACE OF EDINGS, J., DISQUALIFIED.

**EQUITY**—*jurisdiction to restrain destruction of property.*

An owner in possession of property may invoke the process of a court of equity to restrain parties who have repeatedly trespassed upon his property and caused destruction of a part thereof and who threaten future trespasses and acts of destruction.

OPINION OF THE COURT BY COKE, C. J.

The complainant-appellee instituted a suit in equity against the respondents-appellants for an injunction. Summarizing the principal allegations of the bill it appears that the complainant is the owner and in possession of a lot of land situated on the south side of River street in the city of Honolulu and having a frontage along Magoon lane of 79 feet; that in May, 1915, the complainant had commenced the erection of a building on said lot and as a part of the foundation for the building he had constructed a concrete wall along the mauka or northerly boundary of said lot parallel to the makai or southerly line of Magoon lane; that the respondents wrongfully and unlawfully trespassed and entered into and upon said premises and wrongfully and unlawfully broke, dug up and destroyed said concrete wall; that in the month of

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June of the same year the complainant reconstructed said wall and that the respondents again wrongfully and unlawfully destroyed same; that the respondents threaten and intend to continue to trespass and enter upon the premises and to wrongfully and unlawfully break, dig up and destroy any concrete or other wall or building or structure which may be built, erected or constructed by complainant upon said premises. A temporary restraining order was issued against the respondents. The respondent Akana filed a plea in abatement, which plea alleged that said Akana is the owner of a lot of land which borders on the northeast side of Magoon lane and that Magoon lane is eight feet in width and that he has for more than ten years been in the use and enjoyment of said lane and that the use thereof in its full width, to wit, eight feet, is necessary to the proper enjoyment of the land owned by him; that the complainant claims the right to encroach upon said lane and to reduce the width thereof to such an extent as to interfere with the rights of said Akana. The plea avers that there has been no adjudication at law of the rights of the parties in the premises; that the respondent Akana is entitled to such an adjudication at law and he prays judgment whether the court should take further cognizance of the suit.

The plea in abatement was overruled and the respondents filed separate answers. The answer of respondent Colburn denies any participation in any wrongful act against the rights of the complainant and denies any interest in the property in question or any participation in the controversy. The respondent Akana interposed an answer and cross-bill. The answer set out in more detail the matters alleged in the plea in abatement. The cross-bill contained allegations calling for affirmative relief against complainant for the alleged interference by him with the use and enjoyment by Akana of the lane in question and

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for damages and costs. After the trial upon the issues involved the circuit judge rendered a decision wherein he held that the concrete wall or foundation of complainant's building was within the boundary of the lot owned by him and that the same did not encroach upon Magoon lane; that the evidence showed that the respondent Akana had encroached upon the lane and had erected a building a part of which extended into the lane and caused the reduction in its width; that the temporary injunction should be made permanent; that the cross-bill of respondent Akana be denied and dismissed and that the complainant have his costs. A decree based upon the decision was entered and from it the cause is brought to this court on appeal.

The first point raised by the respondents in their brief attacks the correctness of the action of the court in overruling the plea in abatement and the second complains of certain findings and conclusions of the trial judge contained in his decision and incorporated into and made a part of the decree.

The matters alleged in the plea in abatement were insufficient to oust the court, sitting in equity, of its jurisdiction in the premises and the plea was properly overruled. Counsel for respondents relies principally upon the case of *Perry v. Lucas*, 11 Haw. 350, as an authority supporting his view that a court of equity has not jurisdiction over the subject-matter of a controversy such as is presented by the pleadings in the case at bar. We do not think that case in point. In the *Perry* case there was some doubt whether the bill was to be regarded mainly as one to establish boundaries or as a bill to remove a cloud. The court held that under the allegations contained in the bill no relief could properly be had in a court of equity. In the present case we have a petition addressed to a court of equity by the owner in possession of the property to re-

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strain parties who have trespassed upon the property and caused destruction of a part thereof and who threaten future trespasses and acts of destruction. Upon two recognized principles equity would afford relief in such a case. First, because the threatened acts of the respondents, if carried into effect, might tend to the destruction of the property, and, second, the repeated acts of trespass would result in a multiplicity of suits. See 22 Cyc. 826.

The whole controversy is the result of a dispute as to the proper location of the boundaries of Magoon lane. Complainant and respondent Akana each owns a lot adjoining the lane and it appears that Akana, as well as the public at large, enjoys a right of way over the full length and breadth of the lane and any encroachment thereon would contravene that right. Prior to the time he commenced the construction of the concrete wall or foundation complainant obtained the services of Mr. Harvey and Mr. Newton, two surveyors whose qualifications as such were admitted, and by them the mauka or northerly boundary of complainant's lot was established and they both testified that the wall or foundation erected by him was within the boundary of his lot and that it did not extend into or upon Magoon lane. Against this the respondent Akana took the witness stand and testified that his own building was not beyond the boundary of his lot as the lines thereof were staked and pointed out to him by a representative of the government at the time he first acquired title. There is no doubt that by encroachment from some source the width of the lane has been reduced approximately 1.4 feet, but from the evidence before him the circuit judge found that it was the building of the respondent Akana and not the wall of the complainant which extended into the lane and resulted in the reduction of its width. A clear preponderance of the evidence sustains that finding.

The record presenting a cause properly cognizable by

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a court of equity and the evidence fully sustaining the relief granted the decree appealed from is affirmed.

*W. J. Robinson* and *W. B. Lymer* for complainant.

*J. B. Lightfoot* for respondents.

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K. TOMISHIMA *v.* P. F. HURLEY.

No. 1102.

MOTION TO QUASH WRIT OF ERROR.

ARGUED FEBRUARY 11, 1919.

DECIDED FEBRUARY 14, 1919.

COKE, C. J., EDINGS, J., AND CIRCUIT JUDGE DEBOLT IN  
PLACE OF KEMP, J., ABSENT.

*Per Curiam*: The plaintiff, defendant in error, has interposed a motion to quash the writ of error issued upon the petition of the defendant, plaintiff in error, upon the ground that the bond filed is not in compliance with section 2527 R. L. 1915. In the oral argument of counsel in support of the motion he questions the validity of the bond because of the form thereof and for the additional reason that the principal, P. F. Hurley, executed the bond "by E. C. Peters, attorney-in-fact." The form, terms and conditions of the bond appear to meet the requirements of section 2527 R. L. 1915. The failure of the attorney-in-fact to present with the bond his authority in the premises, even if amounting to an irregularity or informality, would not justify the granting of the motion to quash the writ. "No motion for a new trial, bill of exceptions, appeal or writ of error shall be dismissed for any informality or insufficiency of any bond, unless upon neglect of the party filing



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such bond to comply with an order of a court or judge having jurisdiction directing an amendment of such bond to be made within a specified time, not less than twenty-four hours." Sec. 2536 R. L. 1915. See also *Wright v. Brown*, 11 Haw. 401.

The motion to quash is overruled.

N. W. Aluli for the motion.

A. G. Smith contra.

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IN THE MATTER OF THE TRUST ESTATE OF  
ROBERT W. HOLT, DECEASED.

No. 1157.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

HON. C. W. ASHFORD, JUDGE.

ARGUED FEBRUARY 7, 1919.

DECIDED FEBRUARY 14, 1919.

COKE, C. J., EDINGS, J., AND CIRCUIT JUDGE DEBOLT IN  
PLACE OF KEMP, J., ABSENT.

PRACTICE—*appeals*.

This court will not consider an appeal where the record transmitted to it is so incomplete as to render its judgment thereon conjectural.

*Per Curiam*: This is an appeal from the order of the circuit judge of the first circuit allowing an attorney's fee of fifty dollars for services rendered the trustee in the collection of certain rents, as charged by the trustee in its annual accounts, the appellant claiming that the amount so paid should have been charged to and collected from the beneficiaries of said estate who were solely benefited

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by such collection. The record presented to this court is so incomplete and unsatisfactory as to render any decision upon the subject purely conjectural.

The appeal is therefore dismissed and the order appealed from is affirmed.

*Achi & Achi* for appellant.

*B. L. Marx* (*Frear, Prosser, Anderson & Marx* on the brief) for the trustee.

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MANUEL DO REGO *v.* H. OYAGI AND  
KAILI HALAMA.

No. 1154.

## MOTION TO DISMISS.

ARGUED FEBRUARY 18, 1919.

DECIDED FEBRUARY 24, 1919.

COKE, C. J., EDINGS, J., AND CIRCUIT JUDGE DEBOLT  
IN PLACE OF KEMP, J., ABSENT.

APPEAL AND ERROR—*exceptions—judgment.*

A judgment is not an essential part of the record on exceptions and it is immaterial whether a judgment has or has not been entered in the lower court.

SAME—*same—same.*

Exceptions to a judgment would be effective only to present any question properly raised as to its form but could not serve to bring up the merits of the decision.

## OPINION OF THE COURT BY COKE, C. J.

At the conclusion of the trial of the above cause in the circuit court, which was had jury waived, a decision

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was rendered in favor of plaintiff and against defendants. An exception to the decision was noted by counsel for defendant Halama who then interposed a motion for a new trial which was denied. Said defendant also noted an exception to the order denying the motion and thereafter duly presented his bill of exceptions and the same was allowed by the judge of the circuit court. The record on exceptions has reached this court and plaintiff by his attorney now interposes a motion to dismiss the bill of exceptions for the reason that no final judgment has been entered in said cause.

The motion is without merit. An appeal in equity brings up the decree; a review by writ of error in a law case brings up the entire record including the judgment, and a bill of exceptions presents to the appellate court only so much of the record of the lower court as may be necessary to make the exceptions intelligible. The judgment is not an essential part of the record on exceptions and it is immaterial whether a judgment has or has not been entered in the lower court. An opinion defining the inherent distinction between statutory appeals and writs of error on the one hand and appeals by bills of exception on the other is to be found in *Meheula v. Pioneer Mill Co.*, 17 Haw. 91. The subject is so lucidly and fully dealt with as to render that opinion a beacon light to those unfamiliar with the principles involved. We quote therefrom as follows: "A bill of exceptions, unlike a writ of error or an appeal, does not bring the entire case or its record to this court. We have merely to decide whether the exceptions are good or bad. If they are overruled that is the end of the functions of this court relating thereto, nothing remaining but the order, notice or remittitur, on receipt of which the judgment in the circuit

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court if it had been entered but suspended pending the exceptions remains in full force, requiring no affirmance or other recognition from this court. If no judgment was entered on the verdict it is entered by the circuit court upon notice of the overruling of the exceptions. This result follows as a matter of law and not in consequence of any direction of this court. The records of the case and all papers filed in the circuit court are, it is true, often sent here with the bill of exceptions, as in appeals and writs of error, but the practice is incorrect. When causes are appealed \* \* \* we have before us the entire record and may review, reverse, affirm, amend, modify or remand for a new hearing in chambers such decision, judgment or decree in whole or in part as to all or any of the parties. In cases of error \* \* \* the supreme court shall have power to enter such judgment in the case as in their opinion the facts and law warrant. \* \* \* This court has by law no power in overruling exceptions to make a judgment."

Counsel for plaintiff erroneously assumes that in the opinion of this court in *Holiona v. Kamai*, 24 Haw. 638, language is to be found which justifies his conclusions. In that opinion it was held that "An appeal filed prior to the filing of the decree appealed from is premature. \* \* \* The same would be true of a bill of exceptions presented for allowance prior to the entry of the judgment or order to which the exceptions related." The use of the word "judgment," in the foregoing quotation, is also found in the statute providing for interlocutory exceptions. See Sec. 2513 R. L. 1915. It might at first appear that the word is inadvertently employed because an exception to the judgment does not serve to bring up the merits of the decision. All possible confusion in this respect is

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cleared away by reference to the opinion in *Nahaolehua v. Heen*, 20 Haw. 613, 616, where it is held that "The exception to the judgment would be effective to present any question as to its form, had such been raised, but it did not serve to bring up the merits of the decision."

The exceptions in this cause run to certain rulings of the court during the trial, to the decision rendered, and to the order overruling the motion for a new trial. The entry of judgment was unnecessary as a prerequisite to the bill of exceptions and had the judgment been entered it would have no place in this record.

The motion to dismiss the bill of exceptions is denied.

*E. R. Bevins* for the motion.

*Enos Vincent* contra.

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MILEKA WHITFORD v. LUCY KAHANANUI, ALSO  
KNOWN AS LUCY LANI.

No. 1152.

EXCEPTIONS FROM CIRCUIT COURT, SECOND CIRCUIT.

HON. L. L. BURR, JUDGE.

ARGUED FEBRUARY 18, 1919.

DECIDED FEBRUARY 25, 1919.

COKE, C. J., EDINGS, J., AND CIRCUIT JUDGE DEBOLT  
IN PLACE OF KEMP, J., ABSENT.

DECISION—*deed not in evidence, not considered.*

Where the court, trial by jury being waived, in considering evidence adduced refers to certain discrepancies between the description of land contained in a deed (not in evidence) and in the complaint, but it appearing that the reference to the discrepancies was a mere cursory remark and that the

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court in arriving at its decision did not take the deed into consideration, such reference to the discrepancies mentioned is not prejudicial error.

**EVIDENCE—*supports findings and decision.***

There was evidence in this case to sustain the findings and decision of the trial court.

## OPINION OF THE COURT BY EDINGS, J.

This is an action to quiet title instituted by Mileka Whitford, the plaintiff-appellant, against Lucy Kahananui, the defendant-appellee, the plaintiff-appellant claiming an undivided half interest in a certain piece of land situate at Waiehu, Maui, and described as apana 1, Royal Patent 6165 to Kamahiai. Upon the trial of the case before a jury it was conceded by defendant-appellee that the parties to the action were cotenants, being cousins, and are the only heirs of their respective fathers, who were brothers and who were the sole heirs of the patentee Kamahiai.

The testimony of the plaintiff is in substance that Anapu and Kahananui were the original owners of the land, inheriting it from their father, Kamahiai, the patentee; that she inherited a half interest in the property as the sole heir of Anapu and that Lucy inherited a half interest as the sole heir of Kahananui; that the land is taro and agricultural land; that the defendant is now in possession of the land. The land is leased to Chinese and Japanese by Lucy. "My father was away in Honolulu for forty-five years." "He (my father) never lived on the land during my life." Lucy's mother had charge of the land and held it up to the time of her death in 1875. She (Lucy) got all of the money from the lease of the land. "I never asked her for or received any of the money from the land. When my father died I found out from the records in Honolulu

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that I had an interest in the land." The defendant testifies that she is in possession of the land. "My father bought the land." (A deed purporting to convey the land was offered for identification and marked "Defendant's Exhibit A.") "At the time of the death of my mother she had possession of the land and cultivated it. Upon a portion of the land my mother put my sister to live with her foster parents and when she became of age she leased that portion of the land to Japanese. After she died I got hold of everything in my own hands. My mother died about 23 years ago. I rented the land and collected the rent." The plaintiff-appellant has never demanded any of the rent. Last year was the first time she claimed the land. The deed marked "Defendant's Exhibit 'A' for identification" was here offered in evidence and objected to by plaintiff-appellant's counsel upon the ground that "it is incompetent, irrelevant and immaterial \* \* \* this deed now being offered by the defendant purports to be a deed from Kamahiai to Kahananui conveying certain piece of land described in Land Commission Award 2409. The land now in question before this court is described in Land Commission Award 2419. It also mentions Royal Patent 6065. The land that is named in the Royal Patent before this court is named 6165. We will go one step further. If these figures are wrong, and there has been some mistake, this deed is bound by the metes and bounds and this metes and bounds in this deed does not conform to the metes and bounds in this complaint." At this stage of the trial the court and counsel for both litigants arrived at the conclusion, as expressed by the court, that "This case brings itself down to two points of law: whether this deed really conveys the property and is a valid deed; and if it is not, the next question of law is whether this plaintiff is barred by (the) statute of limitations."

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"And there being no question of fact for the jury then there can be nothing for them to pass on." Whereupon with the consent of counsel for each of said litigants the jury was discharged, and it was agreed that the "two points of law be passed upon by the court," counsel to submit briefs thereupon. Thereafter the court rendered its decision, omitting to state therein or elsewhere whether or not said deed was admitted in evidence or rejected and the record transmitted to this court fails to shed any light upon the subject. In its decision the court in a perfunctory manner refers to the discrepancies between the figures in the deed and those in the complaint and adds: "In view of the fact that the case will be decided on other grounds it is not necessary to decide or further discuss whether the scribner in six instances made 1 like 0, or 0 like 1, or whether they were just plain errors," and after reviewing the testimony proceeds to decide the case in favor of the defendant—that the evidence establishes the fact that the defendant has acquired title to the property by adverse possession for the statutory period. To this decision the plaintiff duly excepted upon the following grounds: First. "The court having heard all of the evidence and argument in the above entitled cause, rendered a decision in favor of the defendant and against the plaintiff on the 22nd day of August, 1918, to which decision and judgment plaintiff has filed a written exception on the ground that the court erred in its decision making certain findings of fact and conclusions based on matters and things not in the evidence in this case, concerning a deed from Kamahiai to Kahananui, and that said decision is contrary to law, the evidence and the weight of the evidence." Second. To the court's overruling plaintiff's motion for



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a new trial based upon identically the same grounds and couched in the same language.

The principal grievance alleged in the exception is the reference by the court to certain discrepancies between the description of the land contained in the deed and in the complaint. The comments of the court appear to be mere cursory remarks which could have been based upon the argument of counsel for the plaintiff or in his brief filed in the circuit court (a part of the record) where the subject is fully set forth and critically reviewed without any consideration of the contents of the deed. Furthermore, the language of the court clearly indicates that in arriving at a decision the deed was entirely ignored or repudiated which certainly was not prejudicial error to the plaintiff.

The assertion that the decision was "contrary to the law, the evidence and the weight of evidence" we do not consider sustained. This court has frequently held that a decision of a circuit court, jury waived, is equivalent to a verdict of a jury and will not be disturbed if supported by evidence, a rule which we have not been shown any reason for repudiating.

The exceptions are found without merit sufficient to warrant a reversal of the decision of the trial court and are overruled.

*Enos Vincent* for plaintiff.

*E. R. Bevins* and *Wendell F. Crockett* (*Crockett & Crockett* and *E. R. Bevins* on the brief) for defendant.

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FRANK G. CORREA v. JOSE FREITAS FELIPPE,  
ET AL.

No. 1138.

ERROR TO CIRCUIT COURT, SECOND CIRCUIT.

HON. W. S. EDINGS, JUDGE. .

ARGUED FEBRUARY 18, 1919.

DECIDED FEBRUARY 27, 1919.

COKE, C. J., AND CIRCUIT JUDGES ASHFORD AND DEBOLT  
IN PLACE OF KEMP AND EDINGS, JJ., DISQUALIFIED.

APPEAL AND ERROR—*statutory requirements.*

The steps required by statute for taking an appeal must be taken within the prescribed time or the appeal will be ineffective.

SAME—*same—land court.*

In an appeal from a decree of a land court to the circuit court for a jury trial issues must be framed in the land court within thirty days after the date of the decree or within such further time as the court shall allow, and where no further time has been allowed and issues are framed after the expiration of thirty days from the date of the decree the appellate court does not acquire jurisdiction of the cause and the appeal will be dismissed upon motion.

OPINION OF THE COURT BY COKE, C. J.

The petitioner, plaintiff in error, Frank G. Correa, in 1916 filed his application in the land court of the Territory of Hawaii to register and confirm title in himself to a tract of land situated at Omaopio, Kula, County of Maui. At the time the petition was heard in the land court the defendants in error, David Kapiioho, Sarah Keawe and Apo Liilii were the only persons who appeared and contested the application. At the conclusion of the trial a decision was rendered by the judge of the land court finding that the petitioner had a good title in fee simple to the lands

## Opinion of the Court.

described in the petition and that petitioner should have his title registered and confirmed as prayed for. Pursuant to the decision a decree confirming and registering petitioner's title to said land was duly entered in the land court on March 4, 1918. The three contesting respondents thereupon filed their notice of appeal from said decree to the circuit court of the second judicial circuit and demanded a trial by jury of the issues involved. The issues were framed in the land court by the judge thereof and were transmitted to the circuit court together with other records in the cause. Thereupon the petitioner interposed a motion to dismiss the appeal of the contestants on the ground that the issues of fact to be tried before a jury were not framed within thirty days after the decree and that the record was not completed within said time as required by law. This motion was denied and the cause went to trial before a jury resulting in a verdict favorable to the contestants.

The cause is brought to this court by the petitioner on a writ of error and we are first confronted with the motion presented by the petitioner in the circuit court to dismiss the appeal of the three named contestants. It follows as a matter of course that if the appeal from the land court to the circuit court was not perfected as required by the mandatory provisions of the statute the motion to dismiss should have been granted and the subsequent proceedings had in the circuit court are null and void for the reason that the circuit court was devoid of jurisdiction. We cannot ascertain with any degree of certainty from the records transmitted to the circuit court from the land court the date upon which the issues were framed nor just when the record reached the circuit court, but in the oral presentation of the matter before us counsel for the respondents admitted that the issues were not framed in the land court within thirty days after the date of the decree, it being

## Opinion of the Court.

conceded by him that the issues were framed on the 4th day of April, 1918, which was thirty-one days after the decree was entered. In justice to the judge of the circuit court it might be said that it does not appear from the record that this admission was made in the circuit court upon the hearing of the motion to dismiss. Counsel endeavors to justify the noncompliance with the terms of the statute by showing due diligence and effort upon his part to have the issues framed within the statutory period and failing in this to secure an order granting further time therefor. But the exercise of diligence is not sufficient to overcome the express directions of the statute which provides: "Upon such appeal (referring to an appeal from a decree of the land court to the circuit court) for a jury trial, issues shall be framed therefor in the land court within thirty days after the date of such order, judgment, decision or decree or within such further time as the court shall allow, and within such time the appellant shall file in the circuit court copies of all material papers in the case certified by the registrar, or upon the permission of the judge of the land court he may transmit the original papers to the circuit court. No matters shall be tried in the circuit court except those specified upon appeal." See Sec. 3145 R. L. 1915. It being expressly conceded by counsel for respondents that the issues were not framed within thirty days after the decree and no further time therefor having been allowed by the court the appeal was not perfected within the time prescribed by the statute and the circuit court did not acquire jurisdiction of the cause. In the early case *Re Oopa*. 3 Haw. 407, it was held that the steps required by statute for taking an appeal must be taken within the prescribed time or the appeal will be ineffective, and the rule thus announced has been consistently adhered to by this court to the present day.

The cause is remanded to the circuit court with instruc-

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tions to grant the motion to dismiss the appeal of the respondents and to vacate and set aside the verdict of the jury and the decree therein entered.

*P. L. Weaver* for petitioner-plaintiff in error.

*E. R. Bevins* (*A. G. Correa* with him on the brief) for respondents-defendants in error.

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JOHN DE MELLO, SR., v. MANUEL C. DE MELLO.

No. 1108.

EXCEPTIONS FROM CIRCUIT COURT, THIRD CIRCUIT.

HON J. W. THOMPSON, JUDGE.

SUBMITTED FEBRUARY 25, 1919.

DECIDED MARCH 4, 1919.

COKE, C. J., EDINGS, J., AND CIRCUIT JUDGE DEBOLT  
IN PLACE OF KEMP, J., ABSENT.

PLEADING—*actions—tenants in common.*

One tenant in common cannot maintain an action at law against his cotenant in respect of the common property unless he has been disselzed or ousted therefrom.

OPINION OF THE COURT BY EDINGS, J.

This cause comes before this court on exceptions to the decision of the circuit court sustaining defendant's demurrer to the plaintiff's declaration. The plaintiff alleges in his declaration that he is the widower of one Maria De Mello, who died intestate, leaving certain lands in South Kona, Hawaii, and several children as heirs at law, it being admitted that the defendant is one of said children; that he (the plaintiff) purchased the interest of several of

## Opinion of the Court.

said children in said land but did not purchase the interest of the defendant; that the land has never been partitioned or divided and that plaintiff and defendant are tenants in common; that defendant used and occupied all of said land with the permission of plaintiff and that said use and occupation are reasonably worth the sum of twenty-five dollars per month for each and every month of such occupation, to wit, from July 1, 1917, to February 1, 1918, and that the interest of plaintiff in said rent is the sum of eighteen and 75/100 dollars per month, making a total of one hundred thirty-one and 25/100 dollars, it being further admitted that there has not been any ouster of plaintiff on the part of defendant.

The defendant filed a demurrer to said declaration upon the grounds: First. "That said complaint does not set forth facts sufficient to constitute a cause of action against defendant;" Third. "That said plaintiff in and by his complaint seeks to obtain an accounting in a court of law instead of in equity," which demurrer was by the court sustained upon each of said grounds and the action dismissed, the second ground being overruled.

The prevailing doctrine, which we adopt, is that where one tenant in common uses and occupies the whole of the common property without excluding his cotenants and without any demand from them for possession, and refusal on his part, in the absence of any agreement to pay rent, he is not liable to his cotenants for the use and occupation of the common property, and since the possession of one joint tenant, or tenant in common, is the possession of all, and all are equally entitled to the use and enjoyment of the property, it follows as a general rule that one tenant cannot maintain an action at law against his cotenant in respect of the common property unless he has been disseized or ousted therefrom. *Bishop v. Blair*, 36 Ala. 80.

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We regard the exceptions as without merit and they are overruled.

*H. G. Middleditch* for plaintiff.

*A. G. Correa* for defendant.

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TERRITORY v. TAKEO NISHI.

No. 1124.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

HON. W. H. HEEN, JUDGE.

ARGUED FEBRUARY 25, 1919.

DECIDED MARCH 12, 1919.

COKE, C. J., EDINGS, J., AND CIRCUIT JUDGE DEBOLT  
IN PLACE OF KEMP, J., ABSENT.

**RAPE—*resistance by woman.***

In the absence of threats or other things which make resistance impossible there must be not only an entire absence of mental consent but there must be the most vehement exercise of every physical means or faculty within the woman's power to resist.

**SAME—*instructions to jury.***

Where there was no evidence that the ability of the prosecuting witness to resist was overcome by reason of unconsciousness, threats or otherwise, it is held to be error for the court to refuse to instruct the jury that in order to convict they must find that the prosecuting witness "did everything she could under the circumstances to prevent the defendant from accomplishing his purpose. If she did not do that it is not rape."

**SAME—*evidence of complaint—probative effect.***

The effect of evidence that a complaint was promptly made by the prosecuting witness is to affect favorably the credibility of such witness and not to corroborate the testimony given at the trial. *Territory v. Schilling*, 17 Haw. 249, overruled.

## Opinion of the Court.

## OPINION OF THE COURT BY COKE, C. J.

The defendant, Takeo Nishi, was tried and convicted in the Circuit Court of the first judicial circuit of the crime of rape and has now brought the cause to this court by bill of exceptions. Six assignments of error are specified, the first four having to do with the instructions given by the trial judge to the jury, the fifth being to the verdict of the jury on the ground that it was contrary to the law and the evidence and the weight of the evidence, and the sixth being to the order overruling defendant's motion for a new trial.

We will first consider the merits of the claim of the defendant that the verdict of the jury was contrary to the law and the evidence which is one of the grounds set up in the motion for a new trial. Counsel for the prosecution makes the point that because this question was not presented to the trial judge by proper motion for a directed verdict both at the close of the defendant's case in chief and at the close of all the evidence the defendant has waived his right to now urge that the evidence is insufficient to sustain the conviction. While there may be some federal cases which prescribe this as the practice obtaining in those courts yet the rule has never prevailed in this Territory. If the verdict is so manifestly against the evidence as to induce the conviction that a mistake has been made or that injustice has been done or where it appears that the verdict is clearly, palpably, decidedly and strongly against the evidence or is manifestly the result of bias or of misunderstanding on the part of the jury the verdict should be set aside. See *Bishop v. Kala*, 7 Haw. 590; *Hayselden v. Wahineaea*, 9 Haw. 51, 56. And so long as that question was properly presented to the court below affording it an opportunity to pass thereon, which was done in this case by defendant's motion for a new trial, the defendant may then have his exception to this court from the adverse ruling of the court.



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A summary of the evidence gathered from the testimony of the several witnesses shows the following undisputed facts: The prosecuting witness, Shigeko Murata, is a Japanese girl, being at the time of the alleged assault about sixteen years of age; the defendant is a Japanese boy and at that time was between eighteen and nineteen years of age; that these two young people had formerly worked together in the same factory and had become friends and companions; that on New Year's day, that is, the 1st day of January, 1918, the complaining witness in company with another Japanese girl by the name of Ochio, of about the age of the complaining witness, sought the defendant and induced him to accompany them to Moanalua park, which is located in the suburbs of the city of Honolulu; after wandering about the vicinity of the park it was finally suggested that they return by an unfrequented path to the government road which converges with the main road near Fort Shafter. There is some diversity of testimony in regard to just what happened at the time the alleged offense was committed, but accepting the version of the prosecuting witness it appears that the defendant requested the prosecuting witness to accompany him to a spot in the grass a few feet from the main road; that thereupon the defendant, together with the two girls, turned off the main road and that the defendant caught hold of the prosecuting witness, threw her to the ground and took off her drawers; that the other girl (Ochio) was present up to that time, after which she went out into the government road. The complaining witness testified that the defendant put his hand upon her mouth and upon her throat; she further testified that she called in a loud voice for five minutes while the defendant was divesting her of her drawers; she also testified that at that time the defendant in a loud voice called Ochio three or four times; that the defendant, while she

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was lying on her back on the ground, had sexual intercourse with her; she further testified that she made no effort to close her legs nor to beat, kick or scratch the defendant; she attempts to excuse her failure to kick defendant to the fact that her drawers were off; she says that while the alleged assault was taking place Ochio called to them that a soldier was coming and the defendant thereupon desisted and they proceeded to the government road; that she noticed blood upon her clothing and thereupon approached the soldier and asked him to help her. There is no evidence that she made any complaint to the soldier of the alleged assault by the defendant. The defendant was there present and after some conversation with the soldier they all proceeded to the station of the street railway company and the defendant was placed under arrest. The prosecuting witness frankly admitted on cross-examination that in October, 1917, she and an elderly Japanese man were attempting sexual intercourse when they were interrupted by the approach of an automobile. Aside from the testimony of the complaining witness there is much significant testimony given by the witness Ochio which tends strongly to refute the claim of the prosecution that there was any actual resistance on the part of the prosecuting witness at the time the defendant had sexual intercourse with her. This may be summarized as follows: That while the defendant and the complaining witness were in the grass close to the road the witness was with them; that they were just playing at the time; that the prosecuting witness was on the ground and that the defendant was sitting beside her; that the witness then proceeded to the government road a few feet away; that she heard the complaining witness scream but once; that both the complaining witness and the defendant called to her to return; that the defendant called to her many times; that

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when the witness saw a soldier she ran into the grass and called "Look out, there is a soldier coming." The defendant testified in his own behalf to the effect that the complaining witness had on many occasions called upon him at his place of work and had often gone to his home in search of him; that she had on many occasions urged him to go out with her but that he had refused; that on the day of the alleged offense, the same being a holiday, he had acceded to the request of the prosecuting witness to go with her to Moanalua park and that it was mutually understood that they should find a suitable place and have sexual intercourse. The defendant admits the act of sexual intercourse alleged in the indictment but denies that it was with force and against the will of the complaining witness, stating that she consented thereto and did not resist and that it was only after the discovery of blood upon her garments that she became excited and started to cry and asked aid of the soldier. It is not claimed by the prosecution that there were any marks of violence of any kind upon the defendant or upon the complaining witness except such lacerations in and about her private organs as would naturally result from the act of intercourse. The clothing of the complaining witness was introduced in evidence and although the outer as well as the inner garments are of light and frail texture yet they present no tearing nor disarray, and when one pauses to reflect upon the terrific resistance which a determined woman would make such a situation is almost if not quite incredible. "In the absence of threats, or other things which make resistance impossible, there must be not only an entire absence of mental consent or assent, but there must be the most vehement exercise of every physical means or faculty within the woman's power to resist penetration and a persistence in such resistance until the offense is consummated. The term 'rape' im-

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ports not only force and violence on the part of the man, but resistance on the part of the woman. There must be force, actual or constructive, and resistance. In the absence of proof of resistance consent is presumed. Mere general statements of prosecutrix that she resisted are not sufficient, but the specific acts of resistance must be shown. The dissent and repulsion must be shown beyond a reasonable doubt." 33 Cyc. p. 1427.

A case bearing great similarity to the one at bar, although stronger upon the facts, is *Brown v. State*, 127 Wis. 193, where the same rule is adopted. Another leading case is *People v. Dohring*, 59 N. Y. 374. See also *People v. Mayes*, 66 Cal. 597.

Measured by these well established principles it is obvious that the evidence in this case falls far short of showing that degree of resistance which is required of the woman in order to sustain a conviction upon the charge of rape. Indeed the resistance upon the part of the prosecutrix, if in fact there was any, was of such an equivocal character as to suggest actual consent. There was no evidence whatsoever that the ability of the prosecuting witness to resist was overcome or even impaired by reason of unconsciousness, threats or exhaustion.

The trial court modified instruction No. 1, requested by the defendant, by striking from the instruction that portion which advised the jury that in order to convict they must find that the prosecuting witness "did everything she could under the circumstances to prevent the defendant from accomplishing his purpose. If she did not do that it is not rape." Counsel for the prosecution endeavors to justify the refusal by the court to give this instruction because "it is only in cases where the complaining witness is not so overcome with fear of great bodily harm from the threats or conduct of defendant that defendant must find that she resisted to the utmost," etc. We think

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the refusal to give that portion of the instruction which was disallowed by the court tended to mislead the jury by suggesting that they might find such situation and excuse in the facts of the case, whereas there was no evidence whatever of any threats or other facts to justify such finding. See *Brown v. State, supra*.

Defendant's exception No. 2 goes to the modification by the court of defendant's instruction No. 7. We find no error in this as the subject was covered by other instructions.

Defendant's exception No. 4 challenges the correctness of the prosecution's instruction No. 3 as given by the court as follows: "If you are satisfied in this case beyond a reasonable doubt that the victim of this alleged crime, Shigeko Murata, made prompt and early complaint of the wrong and injury committed by this defendant upon her person and to her character and chastity, such evidence may be received and considered by you as corroborative of the other testimony given by her in this case." This instruction should not have been given for various reasons. First, it is objectionable because it assumes as a fact that defendant committed a wrong and injury upon the person of the prosecutrix; second, because no complaint of the alleged assault was made by the prosecuting witness, and finally and independently of the other reasons, even had a complaint been made by the prosecuting witness, the instruction is an incorrect statement of the rules governing the effect and purpose of such a complaint. Section 3903 R. L. 1915 reads as follows: "The female upon whom rape is alleged to have been committed, or who is alleged to have been abducted or seduced, is a competent witness in a prosecution for such rape, abduction or seduction; but no person shall be convicted of rape, seduction or abduction, upon the mere testimony of such female uncorroborated by other evidence

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direct or circumstantial.” If it was the purpose of the court to say to the jury in this case that the early complaint by the prosecutrix of the alleged assault of itself constituted the corroboration required by the statute then the instruction was entirely erroneous, and even if such was not the purpose of the court yet the instruction was so worded as to almost certainly mislead the jury. It is not unlikely that the error into which the court fell in this regard is chargeable to the opinion of this court in *Territory v. Schilling*, 17 Haw. 249, where the court stamped with approval an instruction given by the trial court which advised the jury that in a prosecution for rape the complaint of the alleged assault by the complaining witness was in itself sufficient corroboration of the evidence given by her of the alleged assault to alone support a conviction. We think the rule which permits the prosecutrix to testify that she made timely complaint of the alleged assault and the purpose and effect of such testimony is incorrectly set forth in the *Schilling* case, for which, and other misinterpretations of established rules of criminal law, we are forced to the conclusion that the opinion in the *Schilling* case is an unsound precedent. The true rule is well expressed in *State v. Rodesky*, 90 Atl. 1099. In that case the trial judge, dealing with the law requiring corroboration, instructed the jury that “On the question of corroboration you should take into consideration whether Emily (the State’s witness) made a prompt complaint.” In reviewing this instruction the court of errors and appeals of New Jersey said: “He (the judge) in effect told the jury that if they found that a prompt complaint was made by the State’s witness it was a corroboration of the incriminating testimony given by her upon the stand. This clearly was error without regard to the admissibility of the fact of the complaint. Even in trials for rape the fact that a complaint was

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made by the woman is admitted not as corroborative of the facts to which she has testified on the trial but for the purpose of meeting in advance a self-contradiction in her conduct, which, if unexplained, would discredit her as a witness. \* \* \* We do not base the reversal of the present judgment upon the inadmissibility of the evidence of a complaint but upon the wrongful use that was made of this evidence when the jury was instructed that if a complaint was made by the State's witness it was a corroboration of her testimony or might be so construed by the jury."

The defendant's exceptions are sustained to the end that a new trial may be had and it is so ordered.

*C. S. Davis*, Second Deputy City and County Attorney (*A. M. Brown*, City and County Attorney and *A. M. Cristy*, First Deputy City and County Attorney, with him on the brief), for the Territory.

*J. B. Lightfoot* for defendant.

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DAVID K. KAHAULELIO, PLAINTIFF AND DEFENDANT IN ERROR, *v.* BEKE IHIHI AND KIN CHOY, DEFENDANTS AND PLAINTIFFS IN ERROR.

No. 1110.

PETITION FOR WRIT OF ERROR AND SUPERSEDEAS RETURNABLE TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

FILED DECEMBER 19, 1918.

DECIDED MARCH 17, 1919.

BEFORE COKE, C. J., AT CHAMBERS.

Appeal and Error—Application for writ of error from circuit court of appeals—value of matter in dispute—burden of proof.

## Memorandum Opinion.

A writ of error from a final judgment of the supreme court of Hawaii may be had and prosecuted in the United States circuit court of appeals wherein the amount involved, exclusive of costs, exceeds the value of \$5000. The burden of proof is on the plaintiff in error where the record is silent as to the value of the subject-matter in dispute to establish that it is of jurisdictional value.

## MEMORANDUM OPINION.

Judgment in this cause was rendered in favor of plaintiff-defendant in error, and the defendant-plaintiff in error, Beke Ihihi, has applied to me for the allowance of a writ of error from the United States circuit court of appeals of the ninth circuit. The plaintiff-defendant in error, Kahaulelio, by his attorney, J. Lightfoot, Esq., has interposed an objection to the issuance of the writ on the ground that the amount involved does not exceed the sum of \$5000 as required by section 1126A, Vol. 2, U. S. Comp. Stat.

By leave, first granted, both parties have submitted affidavits upon the question of the value of the property involved. In this I have been guided largely by the opinions of the Supreme Court of the United States in *Enriquez v. Enriquez*, 222 U. S. 127; *Red River Cattle Co. v. Needham*, 137 U. S. 632, and *Wilson v. Blair*, 119 U. S. 387. In the last case the court said: "Our jurisdiction in this case depends on the value of the matter in dispute. Final judgment was entered in the action May 24, 1884. At that time there was nothing in the record to show the value. On the 16th of September, 1884, on motion, leave was given to the defendant in the court below to file affidavits of value that day and the plaintiff to file counter-affidavits in twenty days. This was good practice and if oftener adopted would save trouble to parties and to us." The court also lays down the rule in the *Wilson-Blair* case that the burden of proof



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is on the plaintiff in error, where the record is silent as to the value of the subject-matter in dispute, to establish that it is of jurisdictional value. So in the present case the record is silent as to the value of the property in dispute, except, however, it does appear in the record that the property was at the time of the institution of the action leased to one Kin Choy at an annual rental of \$266, the lessee to pay all taxes, rates and assessments for water, sewerage and municipal charges, the lessor reserving to herself the fruit production from four bread-fruit trees growing upon the premises. The record also shows that there is a money judgment for damages in favor of the plaintiff and against defendants in the sum of \$642.80, regarding which there can be no dispute.

The burden being upon the defendant-plaintiff in error to establish the jurisdictional value of the property it becomes necessary for her to show that the real property is of the approximate value of \$4300 in order to entitle her to the writ. Estimating the value of the real property upon the annual rental derived therefrom at the time the action was commenced, to wit, the sum of \$266, I think it fair to assume that the property is of the value of about \$3000, although it appears by affidavit that the property is now yielding an annual rental of \$120.

The affidavits submitted by the respective parties are in direct conflict. The affidavits of the plaintiff-defendant in error show the property to be worth not more than \$3000, while the affidavits submitted on behalf of the defendant-plaintiff in error indicate a value of \$5000. Mr. Ambrose, the present deputy tax assessor at Lahaina, near which village the property is situated, and his predecessor in office, Mr. Dunn, both make oath that the property is of the value of \$5000. At the same time it is stated by them that the taxable value of the prop-

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erty, as fixed by them, is and for many years past has been the sum of \$1000. The property is situated but a short distance from the office of the deputy tax assessor at Lahaina, and if as a matter of fact the property is worth \$5000 we have an astonishing confession of a lack of fidelity to official duty on the part of these officials which is made more glaring by the fact that the laws of the Territory of Hawaii require that real property be assessed for its full cash value. The affidavit of A. D. Furtado represents that he recently purchased from Mrs. Ihihi for \$1100 a piece of land directly across the street from, and containing about one-fifth of the area of, the land in question. This would tend to mislead a person unacquainted with the geography of the locality and the physical conditions there obtaining. The counter-affidavit of Kahaulelio and maps and records on file in this court, of which I take judicial notice, show that the land across the street from the land involved is located upon the seashore and is beach property. On account of climatic conditions, bathing facilities and for other reasons it is of common knowledge that beach property, on account of its demand for residence purposes, is of much greater value than property otherwise situated, and this is particularly true in the village of Lahaina. That portion of the affidavit of Beke Ihihi wherein she represents that the income derived by her from the four breadfruit trees growing upon the premises amounts annually to more than \$60 I consider a gross exaggeration.

I seriously doubt that the property involved is of value sufficient to confer jurisdiction upon the appellate court but others might entertain a different view. I am disposed to facilitate rather than retard the defendant-plaintiff in error in her purpose to effect her appeal, hence that she may have a review of the judgment herein, if by any chance she may be deemed to be entitled

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thereto, I am directing the issuance of the writ and to the end that the question of jurisdiction may be properly presented to the court of appeal I direct that all records on file herein having reference to the question of jurisdiction be transmitted to that court.

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KEAO KAHUMUHUMU KAMAHALO v. WILLIAM J.  
COELHO, ET AL.

No. 1120.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.  
HON. C. W. ASHFORD, JUDGE.

ARGUED FEBRUARY 27, 1919.

DECIDED MARCH 22, 1919.

COKE, C. J., EDINGS, J., AND CIRCUIT JUDGE HEEN IN  
PLACE OF KEMP, J., ABSENT.

**EVIDENCE—*judge's right to call witnesses.***

A judge may call witnesses to supplement the evidence produced by the parties when he believes this necessary.

**SAME—*experts, qualification.***

The question whether a witness is qualified as an expert is largely within the discretion of the trial judge.

OPINION OF THE COURT BY EDINGS, J.

The petitioner-appellee instituted a suit in the circuit court of the first circuit to compel the defendant-appellant, William J. Coelho, in his individual capacity and as trustee of William J. Kuniakea Coelho, a minor, to reconvey to petitioner certain realty situate in the City and County of Honolulu, which petitioner claims the defendant William J. Coelho holds in trust for her, having

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agreed to reconvey the said property to her upon the repayment of certain moneys advanced by the said Coelho for the petitioner as part of the purchase price of said land to be paid to the Territory. The respondent Coelho in his answer to petitioner's bill denied that he held such property in trust for said petitioner or that he ever agreed to reconvey the property to the petitioner upon the repayment of the sum of money advanced by him for the purchase price of the said property, but on the contrary alleged that on the 15th day of August, 1912, the Territory of Hawaii sold said property to petitioner under a sales agreement for the sum of \$584.64, \$116.60 to be paid in cash and the balance in four equal annual payments; that petitioner was indebted to said Coelho in the sum of \$465, and, being unable to pay the second instalment to the Territory on the purchase price of said land, suggested to said Coelho that she (petitioner) assign the agreement she had with the Territory to purchase said land to him, the said Coelho, in trust for his son in consideration of the said Coelho releasing her from the payment of the said \$465, which she, the petitioner, had borrowed from the said Coelho, and that in pursuance of said request and understanding he, the said Coelho, did release petitioner from the payment of said debt of \$465 and the petitioner did assign her interest in said agreement to the said Coelho as trustee for his son, William J. Kuniakea Coelho; that thereafter he, the said Coelho, made the payment due under said contract to the Territory, as trustee for his said son, and that after all of said payments had been made to the Territory under said sales agreement by him as trustee for his said son, the Territory issued a patent to said property to him as trustee for his said son, which property he now holds under said patent as such trustee; that he (Coelho) did not at any time agree to reconvey said land to petitioner upon the repayment to him of the sum of

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money paid by him to the Territory on the purchase price of said property, but that on the contrary the said assignment was an unconditional transfer by petitioner of said property to him (Coelho) as trustee for his said son, for a valuable consideration. Thereafter a trial was had and a decree entered, adjudging and decreeing that the said William J. Coelho as ostensible trustee for his son, William J. Kuniakea Coelho, convey to the petitioner all the right, title and interest which he now holds in his capacity as ostensible trustee for said William J. Kuniakea Coelho in and to the lands described in the bill of complaint (describing the same) and that said William J. Coelho pay to said petitioner the sum of \$47.17, the same being the difference between the amount due under said mortgage to the Mutual Building & Loan Society of Hawaii, Limited, and the amount paid by said William J. Coelho to the commissioner of public lands, with interest thereon, and that said petitioner do within thirty days from the time when the decree shall become final pay said Mutual Building & Loan Society of Hawaii, Limited, the principal and interest due under said mortgage in the sum of \$600.47 together with the expenses in connection with the attempted foreclosure thereof in the sum of \$93.75, and that respondent pay the costs taxed at \$75.50, from which said decree an appeal was duly perfected by the respondent to this court.

The evidence produced by the parties on the trial was exceedingly voluminous, and, as usual, exceedingly contradictory, but it was the sole function of the trial judge to determine the preponderance of the evidence and the credibility to be attached to the testimony of any and all witnesses. Of course when a trial judge suffers improper or irrelevant and prejudicial evidence to be introduced and does not specifically and positively disregard and repudiate such evidence in his findings of fact, his decision

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or decree is reviewable as an error of law by this court. That the trial judge admitted evidence of this character and was influenced in his decree by this irrelevant and improper evidence is the contention of the respondent-appellant, predicated upon the following proceedings and testimony:

First. The respondent-appellant (Coelho) testified that he had loaned to the petitioner certain sums of money and when asked where he had obtained this money to make the loan replied that he had obtained \$600 from one Antone Souza, a resident of Maui. After the submission of the case by both petitioner and respondent the trial judge, after notice to the parties, subpoenaed Souza to appear before him and upon an examination of the said Souza, conducted in the presence of the counsel for both petitioner and respondents, the said Souza testified in substance that he had paid Coelho the \$600, testified to by him (Coelho), and various other sums. The introduction of this testimony can certainly not be considered prejudicial to the respondent, being in corroboration of his own testimony and to his own advantage, and whether or not the proceeding was irregular, the error, if any, was not only harmless but actually beneficial to respondent.

Second. The respondent testified in substance that he had at various times loaned petitioner divers sums of money and produced two receipts purporting to have been signed by petitioner for the sum of \$175 and \$50 respectively, which said receipts were received in evidence and marked exhibits 8 and 10. After the case had been closed and submitted the trial judge, at his own instance, summoned to appear before him one R. W. Breckons, Esq., to testify as an expert as to the genuineness of the signatures to said exhibits 8 and 10, giving notice of such fact to the parties, and on the examination of said Breckons permitting the usual cross-examination. The testimony of

## Opinion of the Court.

Mr. Breckons was objected to at the time by respondent who objected to his testifying as an expert in handwriting for the reason that there "is no foundation laid to show that he is an expert on handwriting," and also to Mr. Breckons testifying "for the reason that the case was closed and submitted to your honor, and it should not be reopened at this time." Both objections were overruled, and after an examination by the judge as to his qualifications to testify as an expert, and cross-examination by counsel, he testified, among other things, that in his opinion the signature to the exhibit 8 and also the signature to the exhibit 10 were not genuine but were forgeries. The second phase of this objection will first receive our consideration.

"The judge's right to call forth evidence has been at times questioned by the bar. That he has no burden of doing so is plain in the law; but that he has no right to cause the evidence produced by the parties to be supplemented, when he believes this necessary, has never been conceded." Sec. 2484 Wigmore on Evidence. In *Coulson v. Disborough*, 2 L. R. Q. B. 316, 318, Lord Esher, M. R. says: "If there is a person whom neither party to an action chooses to call as a witness, and the judge thinks that that person is able to elucidate the truth, the judge in my opinion is himself entitled to call him; and I cannot agree that such a course has never been taken by a judge before." In *Selph v. State*, 22 Fla. 537, 545, the court says: "We do (not) deny the right of the presiding judge, when prompted by sound discretion, to call and examine witnesses of his own accord, when the interests of justice demand it, whether the witness be for or against the State, and in such a case to permit counsel on both sides to cross-examine such witness." In the case of *Thorn v. Worthing Skating Rink Co.* 6 Ch. D. 415 note, 416 note, Jessel, M. R., says: "I have hitherto abstained from exer-

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cising the power which, no doubt, the court has of selecting an expert to give evidence before the court." In the case of *Grigsby v. Clear Lake Water Co.*, 40 Cal. 396, 405, Temple, J., delivering the opinion of the court, in commenting upon expert testimony, remarks: "Ordinarily, it is true, witnesses testify only as to facts, leaving it to the jury to draw their conclusions, but upon matters of science and questions requiring peculiar skill an exception is made. These witnesses ought, perhaps, to be selected by the court, and should be impartial as well as learned and skilful. A contrary practice, however, is now probably too well established to allow the more salutary rule to be enforced." Lord Mansfield, in *Folkes v. Chadd*, 99 Eng. Rep. 589, 590, 3 Dougl. 157, commenting upon the admissibility of expert evidence, remarks: "In matters of science no other witnesses can be called. An instance frequently occurs in actions for unskilfully navigating ships. The question then depends on the evidence of those who understand such matters; and when such questions come before me, I always send for some of the brethren of the Trinity House."

From the foregoing authorities it is perceptible that courts have from the earliest period exercised the right to call in experts to aid them in their deliberations and this right we concede.

As to the right of the court to assume the general superintendence and control of the litigation before it, while we are not inclined to deny the power in *toto*, still less are we inclined to encourage its exercise.

The final objection which we are called upon to consider is the admission of the testimony of Mr. Breckons as an expert. Upon this subject we hold the better rule, and the one which we adopt, to be: "The qualifications of a witness as to knowledge and capacity must be established, as facts, to the reasonable satisfaction of the trial court,



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whose finding will not be reviewed except in case of manifest mistake," or abuse of discretion. 17 Cyc. 31 and cases cited. "The qualification of an expert witness is a preliminary one for the trial court, whose decision is conclusive, unless it appears upon the evidence to have been erroneous or founded upon an error of law." *Hartman v. Muehlebach*, 64 Mo. App. 565. "The question whether a witness is qualified to testify as an expert is largely within the discretion of the trial judge." *Mutual Fire Ins. Co. v. Alvord*, 61 Fed. 752.

That there was in this case a sufficient foundation laid for the introduction of the testimony of Mr. Breckons as an expert is sustained by numerous decisions. It appears that Mr. Breckons had for many years made a special study of handwriting and had investigated very many cases involving the genuineness of signatures. "A person whose business for fifteen years required him frequently to make comparisons of handwritings is competent to testify as an expert in regard thereto, though he testifies that he is not an expert in the sense of making it his business." *Christman v. Pearson*, 100 Ia. 634. A witness who has for many years been engaged in a business which requires him to compare signatures and determine their genuineness is qualified to testify as an expert on the issue of the genuineness of a signature, though he has not made a special study of handwriting. *Wheeler & Wilson Mfg. Co. v. Buckhout*, 60 N. J. L. 102. "A witness who testifies that he has had much experience in comparing handwriting from many years' service as a detective and chief of police is competent to testify as an expert." *U. S. Health & Accident Ins. Co. v. Hill*, 62 So. 954. "It is within the discretion of the trial court to allow bank officers to testify as experts as to handwriting and the difference in inks used in writing and signing a paper." *Savage v. Bowen*, 49 S. E. (Va.) 668.

## Syllabus.

We do not find anything in the present case to demand the corrective interposition of this court.

The decree appealed from is affirmed.

*J. Lightfoot* for petitioner.

*W. B. Pittman* (*Andrews & Pittman* on the brief) for respondents *W. J. Coelho* and *W. J. K. Coelho*, a minor.

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LUM WAI, ET AL, *v.* HONG HOON, ET AL.

No. 1143.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

HON. C. W. ASHFORD, JUDGE.

ARGUED MARCH 6, 1919.

DECIDED MARCH 22, 1919.

COKE, C. J., EDINGS, J., AND CIRCUIT JUDGE DEBOLT  
IN PLACE OF KEMP, J., ABSENT.

**SPECIFIC PERFORMANCE**—*contract for sale of chattel articles.*

Equity will not in general decree the specific performance of contracts concerning chattels because their money value recovered as damages will enable the party to purchase others in the market of like kind and quality.

**SAME**—*same.*

Where, however, particular chattels have some special value to the owner, above any pecuniary estimate, and where they are unique, rare and incapable of being reproduced by money damages equity will decree a specific delivery of them to their owner and the specific performance of contracts concerning them.

**SAME**—*same.*

And where the chattels are such that they are not obtainable in the market or can only be obtained at great expense and inconvenience and failure to obtain them causes a loss which could not be adequately compensated in an action at law a court of equity will decree specific performance.

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**EQUITY—*jurisdiction—multiplicity of suits.***

The mere fact that there exists divers causes of action which may be the foundation of as many different suits between the parties is in itself not sufficient ground to confer jurisdiction upon a court of equity.

**SAME—*same—same.***

In the case at bar the complainants might at their own option bring successive suits against respondents as the breaches of the contract occur or they might remain quiescent until the expiration of the contract and then bring one action at law for the recovery of the entire damages sustained by them. This being a matter entirely within their own control the reason for the interference of a court of equity fails.

**SAME—*mutuality of remedy.***

A contract to be enforceable in equity must be mutual but when payment under the contract is to be made in money mutuality of remedy is not the test for the right to the remedy. The mutuality required is that which is necessary for creating a contract enforceable on both sides in some manner but not necessarily enforceable on both sides by specific performance.

**SAME—*same.***

The present contract is bilateral and not unilateral. It contains mutual executory provisions, that is to say, both parties have bound themselves by reciprocal obligations and this it would seem meets the modern rule of mutuality.

## OPINION OF THE COURT BY COKE, C. J.

The complainants-appellees are a copartnership doing business as the See Wo Poi Shop Company. The respondents-appellants are also a copartnership doing business as the See Hop Sen Company. The complainants in October, 1918, filed in the circuit court of the first judicial circuit their bill in equity for specific performance, injunction, etc. Summarizing the allegations of the bill it is alleged that the respondents are engaged in planting and raising taro on certain land at Kahana on the Island of Oahu and that on November 8, 1917, they contracted in writing with a certain firm called See Wo Chan Company, said contract being an agreement where-

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by respondents agreed to sell and the See Wo Chan Company agreed to buy all the marketable taro to be grown by the seller at Kahana. The contract is attached to and made a part of the bill. The provisions which are pertinent to this controversy are as follows:

"The seller agrees to sell and the buyer agrees to buy all the marketable taro to be grown by the seller at Kahana, Oahu; the seller to gather, trim and bag all taro raised by them and to ship same to the buyer at Honolulu; the seller to ship and way-bill the same and prepay freight to Kahuku and the buyer to pay the freight from Kahuku to Honolulu; all taro so shipped to be of marketable size and free, clear and sound. All taro is to mean the entire crop or crops grown by the seller within the term of this agreement and that are fit for sale or manufacturing into poi.

"This contract is to be and remain in full force and effect for the term of two (2) years from and after the date hereof and within that period the seller shall deliver not less than 10,000 bags of taro and as much more as is grown by said seller and the buyer will take all of the 10,000 bags of taro and as much more as the seller shall grow and ship in accordance with the terms as aforesaid.

"The price to be paid for the taro to be grown and shipped as aforesaid is at the rate of \$1.20 (one dollar and twenty cents) per (100) one hundred net pounds of taro. The buyer agrees to pay for the same or make full settlement at least once each month for all taro shipped, delivered and accepted.

"Shipments are to be made in as equal and regular a manner as possible and there shall be no hold-ups or delay by the shipper and the buyer shall receive and accept the same in accordance with this agreement."

The bill further alleges that on March 24, 1918, the See Wo Chan Company with the consent of respondents assigned said contract to the complainants; that the complainants fully observed and performed the contract on their part but the respondents have since the 4th day of

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May, 1918, refused to perform the same and although having in their possession large quantities of marketable taro grown on said land have refused to sell or deliver to complainants any taro, selling and disposing of the same, and now continuing so to do, to other persons; that at the time of the assignment of said contract to them complainants had numerous customers for the purchase of taro and of the poi manufactured therefrom and had entered into valuable and profitable contracts with a number of said customers; that the present condition of the taro market in the City and County of Honolulu is such that complainants cannot profitably purchase taro in lieu of that to which they were entitled from the respondents and that if complainants fail to procure delivery of said taro they will be unable to make full delivery to their customers, which will injuriously affect their business resulting in the loss of trade and causing irreparable injury and loss of trade incapable of being determined at law or of being estimated or compensated in money; that if respondents continue to make delivery to others complainants will be compelled to bring innumerable suits to prevent such deliveries; that by reason of the foregoing complainants are without adequate remedy at law.

The respondents interposed a demurrer to the bill of complaint which contained the following grounds: (1) That the bill of complaint does not state facts sufficient to constitute a cause of action against respondents; (2) that said bill of complaint does not set forth facts entitling said complainants to specific performance of the contract declared on or to an injunction or to an accounting suit in equity; (3) that equity is without jurisdiction to entertain said suit or to award the relief prayed for by said bill or any relief; (4) that it affirmatively appears from the allegations of said bill of complaint that complainants are not without an adequate remedy at law, but

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that if said complainants have a cause of action against said respondents, a suit for damages at law for alleged breach of contract is the proper and an adequate remedy for said complainants. The fifth ground of demurrer we consider as not bearing upon the issues herein and therefore omit the same.

The trial court overruled the demurrer but allowed respondents an interlocutory appeal upon which the cause is now presented to this court.

The question which overshadows all others involved in this controversy is to be found in the claim of the respondents that the contract is for the delivery of an ordinary commercial commodity, damages for nondelivery of which can be easily and certainly ascertained and readily recovered in a court of law. In other words, we are confronted with this question—have the complainants come to the right court to obtain that which the law will undoubtedly give them, namely, compensation for the loss they have sustained by reason of the breach of the contract? Unless there are peculiar attending circumstances and conditions the remedy at law is adequate in a case of contract to sell chattel articles exclusively where such articles are to be obtained in the market. The adopted rule is: "Equity will not in general decree the specific performance of contracts concerning chattels, because their money value recovered as damages will enable the party to purchase others in the market of like kind and quality. Where, however, particular chattels have some special value to the owner over and above any pecuniary estimate,—the *pretium affectionis*—and where they are unique, rare and incapable of being reproduced by money damages equity will decree a specific delivery of them to their owner and the specific performance of contracts concerning them." 6 Pomeroy Eq. Jur. 3 ed., §748; 22 Cyc. 847, 848: *St. Regis Paper Co. v. Santa*

## Opinion of the Court.

*Clara Lumber Co.*, 67 N. Y. S. 149; *Fothergill v. Rowland*, L. R. 17 Eq. 132. And it is also held that where the chattels are such that they are not obtainable in the market or can only be obtained at great expense and inconvenience and a failure to obtain them causes a loss which could not be adequately compensated in an action at law a court of equity will decree specific performance. *Texas Co. v. Central Fuel Oil Co.*, 194 Fed. 1, 13. In *Equitable Gas Light Co. v. Baltimore Coal Tar & Mfg. Co.*, 63 Md. 285, specific performance was decreed on a contract to sell coal tar which plaintiff needed in order to fill existing contracts and which it was impossible to obtain otherwise than by purchasing in distant cities and transporting the same at great expense. In *Gloucester Isinglass & Glue Co. v. Russia Cement Co.*, 154 Mass. 92, specific performance was decreed on a contract to furnish fish skins to be used in the manufacture of glue. It appeared that fish skins were of very limited production; that most of the producers were under contract and that unless relief was given by specific performance it would be very difficult if not impossible for the complainant to carry on his business.

We do not think that the complainants by the allegations in their bill have brought themselves within the exception to the general rule. The complainants allege that they have entered into valuable and profitable contracts with certain customers; that the present condition of the taro market in the City and County of Honolulu is such that complainants cannot profitably purchase taro in lieu of that to which they are entitled under the contract; that in the event of failure to procure delivery of this taro complainants will be unable to make full delivery to their customers and will be unable to meet the demands of their customers for taro and poi and such failure will injuriously affect complainants' business, trade and credit.

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Complainants nowhere allege that there is not an abundance of taro in the local market ready at hand and easily obtainable by them. It is obvious that if the taro required by the complainants can be obtained in the market in Honolulu, although perhaps at a price in advance of that named in their contract with respondents, the complainants will be able to make full delivery of taro and poi to their customers and their business, trade and credit will remain unimpaired. In that event the complainants could maintain an action at law for damages against respondents for breach of contract and of course the measure of damages could be readily ascertained, hence the injury would not be irreparable. See 22 Cyc. 763, 764. It is nowhere alleged that the respondents are insolvent or that a judgment against them could not be collected.

But, argue complainants, in order to recover in damages at law it would be necessary for them to resort to a multiplicity of suits; that complainants might bring suits monthly to recover damages for the loss of profits for the month but they could not recover in any one suit before the expiration of the term of the contract all of the damages because it would be impossible to ascertain and show what the damages would amount to in any one suit and they are not required to wait after a breach of contract has occurred; that unless one action can be brought in which adequate relief can be obtained equity will always take jurisdiction. If this were a correct statement of the rule equity would entertain jurisdiction and enforce the collection of money payable in installments under a contract. "We do not understand the mere fact that there exists divers causes of action, which may be the foundation of as many different suits between the parties thereto, is a ground upon which equity may be called upon to assume jurisdiction and settle all such



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matters in one suit. The case would not be different if some of the causes of action were not mature. We have never heard it claimed that equity will entertain an action upon a contract requiring the payment of money daily, monthly or yearly. Yet in such a case an action would accrue at each of such periods and there would thus be, prospectively, a great multiplicity of actions. In the case before us, admitting the contract to be divisible, and that an action may be maintained upon every breach, this is no ground for interference by a court of chancery." *Richmond v. Dubuque R. R. Co.*, 33 Ia. 422, 488. And again, "It is urged that the complainants would be put to numerous suits at law and hence the bill has equity upon the doctrine of the prevention of a multiplicity of suits. It cannot be denied but that the complainants might in one action at law sue to recover all of the overcharges paid in the entire cotton season. One suit or a multiplicity of suits, therefore, would be a matter of complainants' own election. There being no necessity for a multiplicity of suits the reason for the interference of a court of equity on the principle mentioned fails." *The Gulf Compress Co. v. Harris, Cortner & Co.*, 48 So. 477, 480. And so in this case the complainants might at their own election bring successive suits against respondents as breaches of the contract occur or they might remain quiescent until the expiration of the contract in November of the present year and bring one action at law for the recovery of the entire damages sustained by them. This would be a matter entirely within their own control, hence, as said in the case last above quoted, the reason for the interference of a court of equity on the principle mentioned fails. See also 10 R. C. L. 281.

For these reasons the bill of complaint fails to show that the complainants have not a plain, adequate and complete remedy at law and the demurrer of the re-

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spondents should have been sustained upon those grounds.

We are finally brought to the consideration of the difficult and controverted rule of mutuality, a subject which has not heretofore, we believe, had the attention of the courts of Hawaii. The respondents argue that specific performance will not be decreed nor an injunction issued to restrain the breach of the contract because of the lack of mutuality of equitable remedy, for the reason (a) complainants could not procure specific performance of respondents' contract to raise, sell and deliver the taro in question as this would involve too burdensome a supervision by the court, and (b) a negative injunction restraining a breach of the contract by the respondents cannot issue herein because no mutuality of remedy exists. The equity rule of mutuality is a subject upon which there is much diversity of opinion. Mr. Pomeroy, in his valuable work on Equity Jurisprudence, seems to favor the rule which requires that the contract must be mutually enforceable in equity, in other words, that equity will not require a respondent to perform his covenant unless complainant by a like proceeding might be compelled to perform his. Yet Mr. Pomeroy says that this doctrine is open to so many exceptions that it is of little value as a rule; and in *Peterson v. Chase*, 91 N. W. 687, it is said that the exceptions to the rule are so numerous and so important that the decided cases establishing them now constitute an almost equal volume of authority. It seems to us that if the rule announced by Pomeroy should have literal application the effect would be to remove from the scope of equity jurisdiction a large class of cases calling for the redress of wrongs where adequate remedies are not to be had in courts of law. In some jurisdictions the rule appears to be entirely ignored, while in a large number of jurisdictions it is adopted as follows: "Equity enforces specific performance when there

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is no adequate remedy at law. This is the ground of this branch of equity jurisdiction and it is not consistent with the test of mutuality of remedy. When payment is to be made in money mutuality of remedy is not the test for the right to this remedy \* \* \* but the remedy of specific performance need not be mutual. The mutuality required is that which is necessary for creating a contract enforceable on both sides in some manner, but not necessarily enforceable on both sides by specific performance." *Eckstein v. Downing*, 64 N. H. 248. See *Shields v. Trammell*, 19 Ark. 51; *Ewins v. Gordon*, 49 N. H. 444; *Phil. Ball Club v. Lajoie*, 202 Pa. St. 210; *Dietrichsen v. Cabburn*, 22 Eng. Ch. 51; *Green v. Richards*, 23 N. J. E. 32.

This seems to be a concrete statement of the better rule, for, as said in *Frank v. Stratford-Handcock*, 77 Pac. 134, the doctrine seems still to be maintained but in modern equity practice it has become very much narrowed in its application by the recognition of a number of so-called exceptions, though the exceptions are so thoroughly established that it would seem more accurate to consider them a part of or a modification of the doctrine itself. The present contract is bilateral, not unilateral. It contains mutual executory provisions, that is to say, both parties have bound themselves by reciprocal obligations, and this it would seem meets the modern rule of mutuality.

Because the courts of law in the case before us will render adequate relief by awarding damages which will fully compensate the complainants for any injury which they may sustain resulting from respondents' failure to perform the contract the order of the circuit court overruling respondents' demurrer is reversed and the cause is remanded with instructions to sustain the demurrer.

W. L. Stanley (W. T. Rawlins with him on the brief) for complainants.

W. B. Lymer (J. J. Banks with him on the brief) for respondents.

## Syllabus.

J. F. COLBURN *v.* KAPIOLANI ESTATE, LIMITED.

No. 1159.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

HON. J. T. DEBOLT, JUDGE.

ARGUED MARCH 14, 1919.

DECIDED MARCH 26, 1919.

COKE, C. J., KEMP AND EDINGS, JJ.

**EQUITY—*accounts and accounting—jurisdiction.***

Section 2473 R. L. 1915 confers upon circuit judges jurisdiction in equity in suits upon accounts when the nature of the account is such that it cannot be conveniently and properly adjusted and settled in an action at law.

**SAME—*same—same.***

Where the accounts are so complicated as to embarrass the remedy at law this constitutes of itself sufficient ground for the assumption of jurisdiction by a court of equity although the accounts are not mutual and no fiduciary relation exists between the parties.

## OPINION OF THE COURT BY KEMP, J.

Complainant filed his bill in equity alleging in substance that on August 7, 1899, he was employed by respondent as its manager, which employment ceased on November 21, 1916; that complainant was to receive as compensation for his services as such manager five per cent. on the income of respondent, and likewise five per cent. on sales of its property; that he was also to receive a certain percentage on loans procured by him for respondent and a reasonable compensation for any and all other services which he might render for respondent.

It is alleged that various and sundry loans were procured by complainant for respondent but that the amounts thereof complainant is unable to state for the reason that

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same are only shown upon the books of respondent and consist of numerous items; that the income of respondent during the period of complainant's employment has amounted to several hundred thousand dollars, the exact amount of which cannot be set forth for the reason that same consists of "hundreds and hundreds of items shown only on the books of respondent." There are allegations as to various sales of property by complainant for respondent and the performance of other services for which compensation is claimed but the amount of said loans cannot be stated for the reason that the information is contained only on the books of the respondent.

Complainant alleges that he has drawn from respondent various amounts of money, consisting of hundreds of small items, as part payment of the amounts due him for the various services performed by him but that there is a large balance due him, the exact amount of which he cannot allege for the reason aforesaid but he alleges that the balance due is in excess of \$25,000.

It is alleged that on the 24th day of July, 1903, there was a settlement of the amount due complainant under said contract of employment but that since said date there has been no settlement or ascertainment of the amount due thereunder.

The prayer is for discovery and accounting and that respondent be directed to pay to complainant what, if anything, shall upon such accounting appear to be due him.

To the bill respondent interposed a demurrer, alleging various grounds, but resting its contention chiefly upon the ground that the complainant has a plain, adequate and complete remedy at law, which contention was by the trial judge sustained and the bill dismissed, from which ruling the complainant has appealed.

Our statute confers upon the several circuit judges

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jurisdiction in equity in "suits upon accounts when the nature of the account is such that it cannot be conveniently and properly adjusted and settled in an action at law." Sec. 2473 R. L. 1915.

This statutory provision is a verbatim copy of the Massachusetts statute which has been several times construed by the courts of that State. *Hallett v. Cumston*, 110 Mass. 32, was a bill in equity against the executors of the will of Wm. Cumston to recover a share of the net profits of a large and profitable business carried on by their testator. The bill alleged that plaintiff and Wm. Cumston were partners in business from November, 1852, until September, 1854, when the partnership was dissolved; that the plaintiff then transferred his interest in the property of the firm to said Cumston and signed a paper by which his salary for the future was fixed at eighteen hundred dollars a year; that it was then orally agreed that the paper fixing his salary was a mere formal paper and that the plaintiff should be paid one-half of the net profits of the business as compensation for his services; that he continued to work for Cumston under this agreement until May, 1865, when a new agreement in writing was made by which he was to receive one-third of the net profits and that under this agreement he worked for Cumston until the latter's death. The bill sought an account of the business of the firm before its dissolution and of the business of Cumston after such dissolution. The defendant demurred on the ground that the plaintiff had a plain, adequate and complete remedy at common law. In ruling upon this demurrer the court said:

"We are of opinion that the relations of the parties after May, 1865, were such that the plaintiff is entitled to maintain this bill. The statute confers upon this court jurisdiction in equity in 'suits upon accounts when the nature of the account is such that it cannot be conveniently and properly adjusted and settled in an action at

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law.' Gen. Sts. c. 113, §2. Under this provision the test of jurisdiction is not whether an action at law can be maintained by the plaintiff upon this account, but whether by means of such action the account can be conveniently and properly adjusted and settled. If it cannot be, an action at law does not furnish an adequate and complete remedy within the meaning of our statutes. In this case the nature of the plaintiff's account is such that it can only be adjusted by a full examination and settlement of all the accounts and business of Cumston. He is entitled to a share of the net profits of the business. The difficulty in settling the account is the same as if he had been a partner. Complicated accounts of this character cannot be conveniently or accurately investigated and adjusted by a jury in an action at common law. On the other hand the proceedings in equity are more flexible and better adapted to the settlement of such accounts."

In *Bartlett v. Parke*, 1 Cush. (Mass.) 82, 85, in construing the same statute, the court said:

"The language of the statute is comprehensive, and in terms gives this court jurisdiction in equity in all cases where an account is to be settled, which cannot be conveniently settled in an action of assumpsit, whether in such cases an action of account would lie before the statute or not."

"It is also well settled that where the accounts are complicated this constitutes of itself sufficient ground for the assumption of jurisdiction by a court of equity, although no fiduciary relation exists between the parties. In order that a court of equity may assume jurisdiction on the ground of complexity of accounts, it is not essential that the accounts should be mutual, that is, consist of items on both sides, provided that they have become so complicated as to embarrass the remedy at law. This rule is applied where the account is made up of many items for and against each party, or the items are numerous and extend over a long period of time." 1 C. J. 618, 619 and cases cited.

In order to ascertain the amount of respondent's in-

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come for the period of time the contract of employment is alleged to have run, every item of its business transacted during that period would have to be examined. This would have to be done in order to ascertain the compensation due to complainant, if as alleged he should show himself to be entitled to five per cent. of the income of respondent. As said by the court in *Hallett v. Cumston, supra*, the difficulty is the same as if he had been a partner. Complicated accounts of this character cannot be conveniently or accurately investigated and adjusted by a jury in an action at common law.

In view of the fact that our statute in question is a copy of the Massachusetts statute the decisions of the courts of that State construing their statute should have great weight with us, especially as the cases quoted from were decided prior to the enactment of the local statute.

We are of the opinion that the complainant's bill states a case which falls within the provisions of the statute defining the equity jurisdiction of the circuit judge and that the demurrer should therefore have been overruled.

The decree appealed from is accordingly reversed and the cause remanded to the circuit judge for further proceedings.

*L. Andrews* (*Andrews & Pittman* on the brief) for complainant.

*A. Withington* (*J. Lightfoot and Castle & Withington* on the brief) for respondent.



Syllabus.

IN THE MATTER OF THE ESTATE OF CECIL  
BROWN, DECEASED.

No. 1167.

MOTION TO DISMISS.

ARGUED MARCH 14, 1919.

DECIDED MARCH 26, 1919.

COKE, C. J., KEMP AND EDINGS, JJ.

*COURTS—rules—record on appeal.*

It is the duty of the appellant to see that the records are transmitted to the appellate court within the time prescribed by the rules. This is a responsibility which the appellant cannot delegate to the clerk of the circuit court and then excuse non-compliance with the rules because the clerk failed to follow instructions.

*SAME—same—same.*

An appellant should make it his business to bring the record to this court within twenty days after the appeal is perfected, or, if that period is too short, then to request of this court or a justice thereof additional time. In the present case his failure to do either is inexcusable.

OPINION OF THE COURT BY COKE, C. J.

The petitioner-appellant, Malcolm Brown, seeks a review by appeal of the decree of the circuit court of the first circuit dismissing his petition. The decree complained of was filed on the 17th day of January, 1919, the notice of appeal was filed on the 20th day of January, 1919, the accrued costs were paid and a bond for further costs was filed on the 25th day of January, 1919. The necessary papers on appeal were filed in the supreme court on the 28th day of February, 1919. The respondent-appellee, H. M. von Holt, by his attorneys, Messrs. Frear, Prosser, Anderson & Marx, has interposed a motion to dismiss the appeal for the reason "that the

## Opinion of the Court.

twenty days allowed within which to file the necessary papers on appeal in the above entitled matter had elapsed prior to the filing of the necessary papers and no further time has ever been allowed by the supreme court or any justice thereof within which to file said record on appeal in the supreme court." The appellant through his attorneys has submitted a return to the motion to dismiss, accompanied by an affidavit of Lorrin Andrews, Esq. By these documents appellant attempts to justify the noncompliance on his part with the requirement of paragraph 2 of Rule 1 of this court which provides: "If the necessary papers are not filed in this court within twenty days after the issuance of a writ of error, perfecting of an appeal or allowance of a bill of exceptions or such further time as may be allowed by this court or a justice thereof the appeal may be dismissed for want of prosecution."

It is not denied by appellant that the foregoing rule has not been complied with, but as an excuse for noncompliance appellant represents that on the 25th day of January, 1919, he filed his praecipe with the clerk of the circuit court requiring him to certify and file certain records in the supreme court in said appeal matter. Appellant appears to erroneously assume that it then became the duty of the clerk of the circuit court to see that the necessary records were transmitted to this court within the period prescribed by the rule quoted. When a praecipe is served upon the clerk of the court it becomes his duty to prepare and certify the documents designated in the praecipe but it is the duty of the appellant to see that the records are transmitted to the appellate court within the time prescribed by the rules. This is a responsibility which the appellant cannot delegate to the clerk of the court and then excuse a noncompliance with the rules because the clerk has failed to follow instruc-

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tions. An appellant should make it his business to bring the record to this court within twenty days after the appeal is perfected or, if the period is too short, then to request of this court or a justice thereof additional time. In the present case his failure to do either is inexcusable. Reasonable compliance with the rules must be required if they are to serve the ends of use for which they were adopted. See *Holiona v. Kamai*, ante p. 636; *Laahia v. Poomaikai*, 20 Haw. 39.

For the failure of the appellant to comply with the rules of this court, or to justify his noncompliance therewith, his appeal is dismissed and it is so ordered.

*W. F. Frear* and *U. E. Wild* for the motion.

*Lorrin Andrews* contra.

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TERRITORY v. JAMES M. KEALOHA.

No. 1145.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

HON. W. H. HEEN, JUDGE.

ARGUED MARCH 27, 1919.

DECIDED APRIL 2, 1919.

COKE, C. J., KEMP AND EDINGS, JJ.

APPEAL AND ERROR—*exceptions—burden of sustaining error—transcript.*

The burden of sustaining allegations of error is upon appellant and where for the proper determination of the merits of exceptions a transcript is necessary and none is supplied the exceptions will be overruled.

OPINION OF THE COURT BY COKE, C. J.

From the very meager record before us it appears

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that the defendant James M. Kealoha was convicted in the circuit court of the first judicial circuit upon an indictment containing two counts. The first count in the indictment charged the defendant with the crime of conspiracy to forge the name of her late Majesty, Queen Liliuokalani, to a will and the second count charged the commission of the crime of perjury and subornation of perjury in order to obtain the probate of the forged will. The defendant Kealoha was found guilty by a jury on both counts of the indictment and now comes to this court by a bill of exceptions which contains eight separate exceptions. The first six exceptions are taken to certain rulings of the trial court in reference to the introduction of evidence by the prosecution. Exception 7 is to the verdict of the jury and exception 8 challenges the correctness of the ruling of the trial court overruling defendant's motion for a new trial.

The record before us does not contain the indictment nor the will which it is alleged was forged nor any of the exhibits introduced at the trial. There is no record of the proceedings had in the court below nor is there any transcript of the evidence save that in the bill of exceptions there are contained some brief and incomplete excerpts from the testimony taken at the trial. The record, such as we have before us, is so deficient as to render it utterly impossible for us to pass upon the merits of the several exceptions presented and any attempt to do so would be confined to mere speculation and conjecture. Where a cause is brought to this court by bill of exceptions it is only necessary for the appellant to bring up sufficient of the proceedings of the court below to enable the appellate court to intelligently determine the merits of the exceptions. (*Do Rego v. Oyagi*, ante p. 664.) That has not been done in this case. The defendant recites in his bill of exceptions that he "refers

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to the indictment, the demurrer of the defendant, James M. Kealoha, the plea of the defendant, the minutes of the clerk of said court and the records of said court in this case, the reporter's notes and transcript of evidence, the charge to the jury, the verdict of the jury and the judgment rendered thereon, defendant James M. Kealoha's motion for a new trial, making each and every one of them or certified copies thereof a part of this bill of exceptions as fully as if each one of them were incorporated herein;" but none of these numerous records and documents, except defendant's motion for a new trial, has been brought to this court with the record. The burden of sustaining allegations of error is upon appellant and where for the proper determination of the merits of exceptions a transcript is necessary and none is supplied the exceptions will be overruled. See *Kalamakee v. Wharton*, 19 Haw. 472; *Scott v. Pilipo*, 22 Haw. 174; *Smithies v. Notley*, 22 Haw. 519.

The record before us is so incomplete as to render futile any attempt to determine the merits of the exceptions and for that reason they must be and are overruled.

*C. S. Davis*, Second Deputy City and County Attorney (*A. M. Brown*, City and County Attorney, and *A. M. Cristy*, First Deputy City and County Attorney, with him on the brief), for the Territory.

*W. C. Achi, Sr.* (*Achi & Achi* on the brief) for defendant.

## Syllabus.

ANNIE LEVY *v.* JOHN LOVELL.

No. 1162.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

HON. C. W. ASHFORD, JUDGE.

SUBMITTED MARCH 27, 1919.

DECIDED APRIL 9, 1919.

COKE, C. J., KEMP AND EDINGS, JJ.

DEEDS—*construction.*

In the construction of all deeds and grants the intention of the grantor, when ascertained, should be given full effect when not contrary to law.

SAME—*same.*

The construction placed upon the instrument by the parties themselves should govern, especially after a time long enough to create prescriptive rights thereunder has elapsed.

EQUITY—*practice—laches.*

Where a cause of action has accrued for over twenty years and the petitioner has remained dormant during all that time and does not set forth any excuse or justification for her delay she is guilty of such laches as will warrant a court of equity in refusing her relief.

## OPINION OF THE COURT BY EDINGS, J.

On the 9th day of November, 1917, the petitioner, Annie Levy, filed her bill in the circuit court of the first circuit of this Territory alleging in substance that on or about the 6th day of January, 1898, John Lovell, the respondent, her father, was the owner of certain lands situate on the Island of Kauai, in this Territory; that while petitioner and her two minor children, Victor and Robert Lovell, now of the ages of thirty and twenty-eight years, respectively, were residing with the respondent, her father, on the lands in question, said respondent, on

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the 6th day of January, 1898, made and executed a deed to petitioner in the Hawaiian language, a translation of which is as follows:

“Know all men by these presents that I, John Lovell, of Papaa, Island of Kauai, Hawaiian Islands: By these presents, for and in consideration of one dollar to me paid by Ane, my beloved daughter, the receipt whereof is hereby acknowledged, doth hereby give, grant, release and convey all that house-lot, containing five acres, and situate at the place aforesaid, the same being the acres of the house-lot within my premises being undivided in the hui land conveyed by H. A. Widemann, the same being the hui land of Aliiomanu, Papaa and Moloaa, and all of my right, title and interest in and to the hui land conveyed by J. W. Smith, known as Kaapuna, situate on the Island of Kauai.

“By this conveyance, I to have the care of said premises as guardian and trustee, until my life terminates.”

(The respondent claims that this last paragraph is incorrectly translated, the Hawaiian being: “Ama keia hoolilo ana, e lilo no au i hope a i kahu hooponopono i keia mau waiwai i oleloia maluna a hiki i ka pau ana o ko’u ola,” which should be rendered in English: “And under this conveyance I shall be the representative and trustee of the lands aforesaid during my lifetime.”)

“To have and to hold the said premises with all the buildings, the rights and benefits thereto belonging unto Ane, aforesaid, and with her children namely, Master Victor and Robert, they being her heirs and successors forever. And I, Kaikina, wife of John Lovell, doth hereby approve of this conveyance to our said daughter, and hereby quitclaim all of my right of dower in and to the premises now conveyed by my husband, under the law, when my life terminates.

“In witness whereof we have hereunto set our hands and affix our seals this 6th day of January, A. D. 1898.”

“That since the delivery of the said deed on January

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6, 1898, said John Lovell has had the care, custody and control of the said premises, and said Annie Levy (petitioner) has lived in Honolulu, and is now living in Honolulu with her husband, and has not had the use or enjoyment of the said premises, nor any rents, issues or profits thereof;" that there are about three acres of rice land included in said premises, the reasonable rent of which was and is about sixty dollars a year; that the reasonable value of the house and house-lot included in said premises is and was about one hundred dollars a year; that on the 8th day of February, 1915, said respondent in his own name and not as a trustee leased three acres of rice land—being a portion of said premises—for a term of ten years at an annual rental of fifty-four dollars; that petitioner has consulted counsel and is advised that respondent holds the premises described in said deed as trustee for petitioner and that petitioner is entitled to the rents, issues and profits of the said premises; that respondent "has himself occupied the said premises since said deed of trust up to some time in 1912, when he came to Honolulu to live; that he has at all times since the delivery of the said deed of trust enjoyed the use, occupation and the rents, issues and profits thereof and has claimed the same in his own right;" that respondent refuses to deliver possession of said premises to petitioner or to account to her for the rents, issues and profits of the same.

The respondent in his answer denies that he holds the premises as trustee and alleges that "he holds a life interest in said lands and is entitled to the use and profits thereof."

At the conclusion of the trial the circuit judge rendered a decree holding "that John Lovell has no interest in the premises described above, being the five acres conveyed by said John Lovell to Annie Levy and her chil-



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dren, her heirs and assigns forever; \* \* \* that plaintiff, Annie Levy, is the owner and is entitled to the rents, issues and profits of said premises and to the immediate possession and control thereof \* \* \*; that defendant, John Lovell, his agents, servants or representatives are hereby ordered to cease from exercising any authority or control over the premises above described \* \* \*; that the defendant \* \* \* is ordered to pay to the plaintiff the sum of three hundred and eighty-seven dollars as rents and profits enjoyed by defendant for six years prior to November, 1917;" from which decree the respondent duly perfected an appeal to this court.

Upon the trial there was not any evidence introduced by petitioner, except as to the condition of the house, nor by the respondent, the matter being submitted upon the pleadings.

The first question that presents itself is, what did the respondent mean by the use of the words, "By this conveyance I to have the care of said premises as guardian and trustee until my life terminates," or, as translated by respondent, "And under this conveyance I shall be the representative and trustee of the lands aforesaid during my lifetime?" After this clause comes what may be termed the "habendum:" "to Ane aforesaid and with her children namely, Master Victor and Robert, they being her heirs and successors forever." It is conjectural whether or not the grantor intended that Annie should take a life estate with remainder to her sons or the fee, but for the purposes of this case we may assume that Annie took an estate in fee simple.

One of the cardinal rules of construction is that an instrument in writing should be so interpreted, if possible, as to give effect to the intention of the parties as therein expressed. "In the construction of all deeds and grants there is one essential object to be kept in view,

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and that is to ascertain the true intent of the grantor, and to give full effect to that intention, when not contrary to law. \* \* \* The only rule of much value is to place ourselves as near as possible in the seats which were occupied by the parties at the time the instrument was executed; then, taking it by its four corners, read it. This is the main object of all construction. When the intention of the parties can be ascertained, nothing remains but to effectuate that intention." *Elliott v. Jefferson*, 64 L. R. A. 135, 138, 139.

In this case after the execution of the deed the grantor remained in sole possession of the premises, renting a portion of the same and appropriating the rents to his own use and has continued to do so with the acquiescence and consent of the grantee for over twenty years, and not until she has consulted counsel and been by him informed that the land is hers, does she, the grantee, ever by word or act indicate that this use and occupation by the grantor was not in strict accord with her construction and her understanding of the deed. "Life-estates \* \* \* may be created either by express words or by implication." 16 Cyc. 615. In this deed the grantor's intent, though clumsily expressed, is ascertainable from it as a whole, and was to reserve to himself a life estate in the premises with remainder in fee to his daughter. And this conclusion is in harmony with the apparent construction placed upon the instrument by the parties themselves. "Courts should not give a construction to a deed in direct conflict with that which the parties have themselves put upon it, especially after a time long enough to create prescriptive rights thereunder." *Mansfield v. Place*, 18 L. R. A. 39. The construction placed upon the instrument by the parties themselves should be accepted as the true one. 13 Cyc. 601, 602, 603.

The second question which presents itself is whether

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or not the petitioner should be permitted to maintain this suit in a court of equity. Petitioner in her bill alleges that since January 6, 1898, "defendant has claimed in his own right the use, occupation and rents, issues and profits of the premises;" that her cause of action accrued over twenty years before the filing of her suit, nor does she set forth any facts as an excuse or justification for her unseemly delay.

We are of the opinion that petitioner has been guilty of such laches as to preclude her from the relief prayed for.

The decree appealed from is reversed and the cause remanded to the circuit judge with instructions to dismiss the bill.

*P. L. Weaver* for petitioner.

*Mott-Smith & Lindsay* for respondent.

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TERRITORY *v.* GOO WAN HOY.

No. 1156.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

HON. W. H. HEEN, JUDGE.

ARGUED MARCH 24, 1919.

DECIDED APRIL 11, 1919.

COKE, C. J., KEMP AND EDINGS, JJ.

**EVIDENCE**—*preliminary examination of witness to determine admissibility of prepared signatures.*

It is proper for the court to permit a witness who has written certain signatures which are to be offered in evidence to be examined and cross-examined as to when, where and under what circumstances he wrote said signatures for the purpose of pass-

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ing upon their admissibility, without regard to whether they are in fact admissible.

**SAME—cross-examination to determine competency of witness to give opinion as to genuineness of another's signature.**

Upon the cross-examination of a witness to determine whether or not he is competent to give his opinion as to the genuineness of another's signature it is not error to exclude evidence which would show that the witness could neither read nor write English as that would affect the weight and not the admissibility of his testimony.

**WITNESSES—cross-examination—impeachment.**

A witness may be cross-examined with reference to his past life if such matters tend to weaken his credibility though they might tend to criminate, disgrace or degrade him, and may be compelled to answer unless he claims his constitutional privilege of refusing to answer questions which might tend to criminate him.

**SAME—same—discretion of trial court.**

The extent to which collateral matters may be inquired into upon cross-examination for the purpose of impeaching the credibility of a witness is discretionary with the trial court and its rulings are not subject to review here unless the discretion is abused.

**CRIMINAL LAW—instructions invading province of jury.**

In this jurisdiction a charge which comments upon the weight of opinion evidence in comparison with direct evidence is improper as invading the province of the jury.

**SAME—evidence—cross-examination of accused.**

An accused who voluntarily becomes a witness in his own behalf is subject to the same cross-examination upon collateral matters affecting his credibility as other witnesses.

## OPINION OF THE COURT BY KEMP, J.

The defendant, Goo Wan Hoy, was indicted, tried and convicted of perjury alleged to have been committed while he was testifying in an equity proceeding pending before the Hon. C. W. Ashford, first judge of the circuit court of the first judicial circuit. The indictment contained two counts. The first count charged the defendant with hav-

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ing sworn falsely that he saw W. G. Let sign a certain certificate offered in evidence in said cause and the second count charged him with having sworn falsely that Farm Cornn signed and affixed his notarial seal to a certain certificate offered in evidence in said cause and that he, the defendant, saw the said Farm Cornn so sign and affix his notarial seal to said certificate. There were suitable allegations as to the materiality of the alleged false testimony and the knowledge of its falsity on the part of the defendant, the indictment setting forth fully the circumstances under which the alleged false testimony was given.

In the course of the trial the defendant saved exceptions to various rulings and seventy-three of these exceptions were embodied in defendant's bill of exceptions allowed by the court. The defendant has abandoned many of his exceptions and has confined his argument to six propositions set forth in his brief and which we will examine.

His first complaint is that the court erred in permitting the witness Farm Cornn to testify as to signatures written by him in the office of R. W. Breckons expressly for use upon the trial of this case.

It appears that prior to the commencement of the trial the witness Farm Cornn was called to the office of R. W. Breckons where he, in the presence of Mr. Breckons, wrote his signature a number of times. At the trial and while Farm Cornn was upon the stand as a witness in behalf of the prosecution, he was shown the signatures written by him as above stated and was questioned concerning the making of said signatures and gave his answers over the objection of defendant to the effect that he had written said signatures about two weeks prior to the time of his examination as a witness and that he did so at the request of Mr. Breckons who told him the purpose for which the

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signatures were wanted. It does not appear from the exceptions nor from the transcript of the evidence that said signatures were exhibited to the jury or used by Mr. Breckons or other witnesses giving opinion evidence for the purpose of comparison with the alleged forged signature of Farm Cornn. On the contrary it appears from the evidence that when the signatures were offered in evidence the court refused to allow them to go to the jury and on motion of defendant struck the evidence as to the making of said signatures from the record and instructed the jury to disregard the same. Later the prosecution attempted to have the court reverse its ruling as to the admission of said prepared signatures and to permit same to be exhibited to the jury for comparison with the alleged forged signature of the witness but the court adhered to its former ruling and refused to permit said signatures to go to the jury for any purpose.

Without expressing any opinion as to the admissibility of the prepared signatures, it being apparent from the record that they were not admitted in evidence, we think the preliminary examination of the witness as to the writing of said signatures and the circumstances under which they were written went no further than was necessary to ascertain whether or not the signatures were themselves admissible in evidence. Defendant's whole argument is directed to the proposition that signatures written for the purpose of comparison may not be exhibited to the jury and that to do so constitutes error. With that question we are not concerned and express no opinion thereon. The court very properly permitted an examination and cross-examination of the witness Farm Cornn as to when, where and under what circumstances the proffered signatures were made for the purpose of passing upon the admissibility of said signatures in evidence.

Defendant's second complaint is that the court erred

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in sustaining the objection of the prosecution to certain questions propounded by him to the witness W. G. Let while testifying as to his familiarity with the signature of Farm Cornn. When the witness W. G. Let was testifying counsel for the prosecution undertook to qualify him to give opinion evidence as to purported signatures of Farm Cornn. After the witness had testified upon direct examination that he was familiar with the signature of Farm Cornn, that he had known Farm Cornn for many years and had been familiar with his signature for more than ten years, having seen him write it many thousands of times, he was shown certain instruments by counsel for the Territory containing the name of Farm Cornn and asked whether in his opinion the name written thereon was the signature of Farm Cornn. It was at this juncture that counsel for defendant objected to the witness giving his opinion and offered to show that the witness could not read or write except his own name. He was given permission by the court to examine the witness before ruling upon the objection. After an examination of the witness by counsel for defendant, which developed that the witness claimed to read and write but very little; that he could not write or read an ordinary letter and could not read the documents containing the name of Farm Cornn and as to the genuineness of which he proposed to give his opinion, he was asked: "It is a fact, is it not, that you can't either read or write English?" to which objection was made that it was incompetent, irrelevant and immaterial and not proper cross-examination. This objection was sustained and the court remarked that the examination should be limited to his familiarity with the signature of Farm Cornn. It must be borne in mind that the object of the examination of the witness at this time was to determine whether or not he was competent to give his opinion as to the genuine-

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ness of certain signatures and was not a general cross-examination of the witness upon his testimony. The whole question of the ability of the witness to read and write English is one that affected the weight of his evidence and not its competency or admissibility, and it was therefore not error for the court to sustain the objection.

The defendant next complains of the action of the court in sustaining the objection of counsel for the Territory to certain questions propounded to the witness John Grace by counsel for defendant and directed to impeaching the credibility of said witness. While the witness was under cross-examination by counsel for defendant he was asked the following questions: "So when you testified in Judge Kemp's court you committed perjury because Goo Wan Hoy had told you to, is that correct?" "In the case of *Nawahie v. Goo Wan Hoy* you again committed perjury, did you, in your statements concerning the issuance of the power of attorney, namely Exhibit E9?" Each of these questions was objected to as incompetent, irrelevant and immaterial. The objection was sustained and the witness not permitted to answer, to which rulings the defendant duly excepted. Prior to asking the questions above set out the witness had been cross-examined at length concerning his evidence in the case of *Nawahie v. Goo Wan Hoy*, tried before Judge Kemp, and had stated that he gave certain testimony in that proceeding in regard to a deed and power of attorney from himself and wife to Goo Wan Hoy which was false and that "I testified so and it was not of my own volition. It was what I was instructed by Ahoy." Under these circumstances we cannot see how any answer which the witness might have given would be material to the issue or shed any further light upon the character or reliability of the witness.

It has always been found necessary to allow witnesses



## Opinion of the Court.

to be cross-examined not only upon the facts involved in the issue but also upon such collateral matters as may enable the jury to appreciate their fairness and reliability. To this end a large latitude has been given where circumstances seemed to justify it, in allowing a full inquiry into the history of witnesses and into many other things tending to illustrate their true character. This may enable the court or jury to comprehend just what sort of person they are called upon to believe and such a knowledge is often very desirable. It cannot be doubted that a previous criminal experience will depreciate the credit of a witness to a greater or less extent, in the judgment of all persons and there must be some means of reaching this history. The rules of evidence do not allow specific acts of misconduct or specific facts of a disgraceful or criminal character to be proved against a witness by others but it has been held by this court that a witness may be specially interrogated upon cross-examination in regard to any vicious or criminal act in his life and may be compelled to answer unless he claims his privilege. But the extent to which disparaging questions not relevant to the issue may be put on cross-examination is discretionary with the trial court and its rulings are not subject to review here unless it appears that the discretion was abused. *Republic v. Luning*, 11 Haw. 390. Certainly it cannot be said that the discretion was abused in the rulings complained of here as all the facts that could be gotten from this witness in regard to his testimony in the two proceedings about which he was asked were admitted and it was only when the questions calling for a conclusion based upon this testimony were asked for that the court called a halt in the cross-examination.

A splendid discussion of the rules governing the impeachment of witnesses by cross-examination upon mat-

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ters not relevant to the issue is to be found in *Carroll v. State*, 24 S. W. (Tex.) 100 and in *Wilbur v. Flood*, 16 Mich. 40, both of which cases are cited with approval in *Republic v. Luning, supra*.

The defendant also complains of the court's refusal to give the following requested instruction: "I instruct you that an opinion as to the handwriting of individuals ought to be received with caution, and that direct evidence that an individual saw the persons write the documents in question, is entitled to greater weight than the expression of opinions of witnesses or experts as to the falsity of the handwriting."

"In those jurisdictions in which the determination of the weight and credibility of the evidence is committed solely to the jury a charge which comments upon the weight or credibility of circumstantial evidence in comparison with direct evidence is improper as encroaching upon the province of the jury." 12 Cyc. 597 (d). In this jurisdiction we have statutory provision prohibiting the judge from commenting upon the character, quality, strength, weakness or credibility of any evidence submitted. Sec. 2435 R. L. 1915. "It is error for the court to single out certain testimony in the case and to instruct the jury that this testimony is entitled to very great or little weight, or to otherwise instruct as to its weight." 12 Cyc. 597 (c).

It seems to us that either under the general rule or under the statutory provision in force in this jurisdiction the charge was improper and no error was committed in refusing to give it.

The defendant's next and final argument is based upon the court's action in permitting the defendant while a witness in his own behalf to be cross-examined as to whether or not he had committed crimes other than the one for which he was on trial.

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The court permitted the defendant, over his objection, to be cross-examined as to whether he had forged the name of John Grace and Opiopio P. Grace to certain instruments involved in the same controversy out of which the perjury charge, upon which the defendant was being tried, grew and he now strenuously insists that this action of the court was not only prejudicial to the defendant but that it deprives him of his constitutional right to trial on indictment of a grand jury.

We have seen from an examination of this same question above that a witness may be thoroughly sifted upon cross-examination upon his character and antecedents and may, subject to the constitutional privilege to refuse to criminate himself, be compelled to disclose collateral facts which tend to criminate, disgrace and degrade him, if such other facts tend to weaken his credibility. That being so, unless a defendant is entitled to greater consideration in the matter of cross-examination upon collateral matters tending to impeach his credibility then this contention of defendant is without merit. "Where a defendant takes the witness stand in his own behalf he may on cross-examination be asked about any matter pertinent to the issues although he has not testified on direct examination as to all of the things about which he is asked." *Territory v. Hart*, 24 Haw. 349. It is thus seen that the rule as to cross-examination of a defendant upon matters material to the issue, when testifying in his own behalf, is quite as liberal as in the case of other witnesses and we see no reason why a defendant who has voluntarily become a witness should not be subjected to the same cross-examination upon collateral matters affecting his credibility as other witnesses either in his behalf or against him.

"In criminal cases, it is a well established general rule that the prosecution may not introduce evidence of the

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character of the accused for the purpose of raising an inference that the latter is guilty of the crime for which he is being tried. \* \* \* But where the accused takes the stand as a witness he waives his rights in this regard and his character may be impeached as that of any other witness." Chamberlayne's Hand Book on Evidence, Sec. 1029. See also *Halloway v. People*, 181 Ill. 544, 54 N. E. 1030, and Chamberlayne's Modern Law of Evidence, Sec. 3276.

When a witness is asked upon cross-examination if he did not commit a certain crime and gives an answer, the examining party is bound by the answer and cannot bring other evidence to contradict it (*Republic v. Luning, supra*). In the case at bar the defendant denied the commission of the crimes imputed to him in the questions objected to and no attempt was made to contradict him. No harm could have resulted from the allowance of the questions.

The exceptions are overruled.

*C. S. Davis*, Second Deputy City and County Attorney (*A. M. Brown*, City and County Attorney, and *A. M. Cristy*, First Deputy City and County Attorney, with him on the brief), for the Territory.

*W. B. Lymer* for defendant.

Syllabus.

CHING HON YET, BY HIS GUARDIAN AD LITEM,  
WILLIAM T. CARDEN, *v.* SEE SANG COMPANY  
AND LONDON GUARANTEE & ACCIDENT COM-  
PANY, LIMITED.

No. 1134.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.  
HON. W. S. EDINGS, JUDGE.

SUBMITTED APRIL 12, 1919.

DECIDED APRIL 17, 1919.

COKE, C. J., KEMP, J., AND CIRCUIT JUDGE DEBOLT  
IN PLACE OF EDINGS, J., DISQUALIFIED.

WORKMEN'S COMPENSATION ACT—*compensation to injured employee.*

Where an employee is accidentally injured resulting in temporary total disability and permanent partial disability the injured employee should be awarded sixty per cent. of his average weekly wage for the period of his total disability and after reaching the stage of convalescence where he ceased to be totally disabled but remained in a state of permanent partial disability he should receive for an additional definite number of weeks fifty per cent. of his average weekly wage.

SAME—*sufficiency of notice of claim for compensation.*

Where the notice served by the employee upon the employer contains a statement that the injury consists of the "loss of four fingers of left hand" it sufficiently describes the nature of the injury. The effect of the injury upon the employee became a matter of proof.

SAME—*same.*

Where at the trial the evidence established that the employee had by reason of the accident lost the use of his hand it was not error for the court to award the injured employee compensation for the loss of the use of his hand.

APPEAL AND ERROR—*appeal from award of industrial accident board to circuit court—proceedings.*

Where the employer or the insurance carrier appeals from an

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award made by the industrial accident board to the circuit court the statute contemplates the trial of the cause *de novo* in the appellate court before a jury, if a jury is demanded; otherwise before the court without the intervention of a jury.

## OPINION OF THE COURT BY COKE, C. J.

The claimant-appellee, Ching Hon Yet, who appears by William T. Carden, his guardian *ad litem*, is a boy of about sixteen years of age and at the date of the accident herein referred to, to wit, the 20th day of May, 1918, was employed by the defendant See Sang Company, in operating an electric meat chopper. While in the course of his employment his left hand was caught in the machinery of the meat chopper and all four fingers of that hand were severed close to the body of the hand. The thumb escaped injury. At the time of the injury the appellee was receiving a weekly wage of \$9.60. The defendant-appellant, the London Guarantee & Accident Company, Limited, a corporation, is the insurance carrier. As a result of the injuries sustained the appellee was totally incapacitated for work for a period of eight weeks. The appellee duly filed with the industrial accident board of the City and County of Honolulu a notice of his injury and claim for compensation. At the hearing before the industrial accident board appellee was awarded sixty per cent. of his weekly wage for the period during which he was totally disabled beginning with the eighth day following the date of the accident and was further awarded fifty per cent. of his average weekly wage for a period of 116 weeks, payment thereof to run from the termination of his temporary total disability.

The insurance carrier appeared at the hearing before the industrial accident board by its attorney, H. Edmondson, Esq., and argued that while under the facts and circumstances of the case it was legal and proper for the industrial accident board to award to the appellee

## Opinion of the Court.

compensation at the rate of fifty per cent. of his average weekly wage for 116 weeks, it was illegal and improper for it to award any sum whatsoever for temporary total disability. Section 13, Act 221 S. L. 1915, as amended by Act 227 S. L. 1917, provides that: "Total disability. Where the injury causes total disability for work the employer during such disability, but not including the first seven days thereof, shall pay the injured employee a weekly compensation equal to sixty per centum of his average weekly wages," and section 14 of Act 221 S. L. 1915, as amended by Act 227 S. L. 1917, provides: "Section 14. \* \* \* (b) Permanent partial disability. In case of disability partial in character but permanent in quality the compensation shall be fifty per centum of the average weekly wages and shall be paid to the employee for the period named in the schedule as follows: Thumb. For the loss of a thumb sixty weeks; First finger. For the loss of a first finger, commonly called index finger, forty-six weeks; Second finger. For the loss of a second finger, thirty weeks; Third finger. For the loss of a third finger, twenty-five weeks; Fourth finger. For the loss of a fourth finger, commonly called the little finger, fifteen weeks; \* \* \* Hand. The loss of a hand, two hundred and forty-four weeks; \* \* \* The compensation for the foregoing specific injuries shall be in lieu of all other compensation, except the benefits provided in section 13 of this Act."

It was and still is the position of the insurance carrier that the last clause of section 14 just recited was intended to refer to section 12 which has to do with the furnishing by the employer to the injured employee reasonable surgical, medical and hospital services and supplies. It was determined by the industrial accident board that this clause in the Act means what its plain and unambiguous language clearly imports, to wit, that the

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compensation for the specific injuries recited in section 14 should be in lieu of all other compensation except the benefits provided in section 13 of the Act. With this holding we are in full accord. The plain intention of the legislature was to take care of an injured employee whose injury resulted temporarily in total disability and for that period he should receive sixty per cent. of his average weekly wage, and after reaching a stage of convalescence where he ceased to be totally disabled but was still in a state of permanent partial disability he should then receive for an additional definite number of weeks a lesser compensation, to wit, fifty per cent. of his average weekly wage. Any other construction of this statute, it appears to us, would do violence to the intention of the legislature as clearly and unequivocally expressed in the Act.

The insurance carrier being dissatisfied with the order of the industrial accident board perfected an appeal to the circuit court where the case was tried without the intervention of a jury—a jury having been waived by the act of the parties. After the case reached the circuit court Mr. Carden was appointed guardian *ad litem* of the appellee. When the case came on for trial before the circuit court the appellant offered no evidence but submitted the case upon the record of the proceedings had before the industrial accident board. Mr. Carden, representing the appellee, sought and received permission to have the testimony of the appellee taken, and while appellant's exception No. 1 recites that counsel for the appellant objected to any evidence being adduced at the hearing of said appeal and that the court overruled the objection and that appellant duly excepted to the ruling of the court, the certified record of the proceedings had before the circuit court, which appears to be full and complete, does not disclose that any such proceeding as



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contained in appellant's exception No. 1 did as a matter of fact take place and we are at a loss to account for the presentation to this court of the exception when the same is wholly unsupported by the record. Appellee gave the details of the injury and exhibited his injured hand to the court. He further testified that by reason of the loss of the four fingers he is unable to use his hand. The appellant made no attempt to contradict this evidence. The circuit court thereupon found in favor of the appellee awarding him sixty per cent. of his average weekly wage for the period of his total disability, to wit, seven weeks from and after the 28th day of May, 1918, and further awarded him fifty per cent. of his average weekly wage for a period of 244 weeks commencing at the expiration of the period of total disability, it having been found by the circuit judge that appellee had suffered the permanent loss of the use of his hand.

The appellant has brought the case to this court by bill of exceptions and reiterates his contention respecting the construction of sections 13 and 14 of Act 221 S. L. 1915 as amended by Act 227 S. L. 1917, which we have disposed of *supra*, and makes the further claim that because the appellee herein did not appeal from the award of the industrial accident board he is to be regarded as having accepted the award and that while the circuit court might have reduced the amount of the compensation awarded by the industrial accident board it was without power to increase the amount. The determination of this question hinges upon the construction of sections 38 and 41 of Act 221 S. L. 1915, which read as follows:

"Section 38. An award of the board, in the absence of fraud shall be final and conclusive between the parties except as provided in section 37, unless within ten days after a copy has been sent to the parties either party

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appeals to the circuit court of the circuit in which said board is located. In the County of Hawaii the circuit court shall be that of the fourth circuit. In case of every such appeal the right of a trial by jury shall be deemed to be waived unless claimed within ten days from the date such appeal is entered. Said court may by proper rules prescribe the procedure to be followed in the case of such appeals.

"The board may certify questions of law to the supreme court of the Territory for its determination."

"Section 41. All questions arising under this Act, if not settled by agreement of the parties interested therein with the approval of the board, shall, except as otherwise herein provided, be determined by the board. The decisions of the board shall be enforceable by the circuit court under the provisions of section 39. There shall be a right of appeal from decisions of the board to the circuit court as provided in section 38, but in no case shall such an appeal, either under this section or under section 38, operate as a supersedeas or stay unless the board or the circuit court shall so order."

If the proceedings on appeal before the circuit court as contemplated by the sections quoted require a trial *de novo* regardless of whether the cause is to be tried with or without a jury, the question must be decided adversely to the contention of the appellant.

The position of appellant seems to be that if the trial is to be by jury then the trial should be *de novo*, but if a jury is waived and the case is to be tried before the court then the cause should be heard upon the record of the proceedings before the industrial accident board and the court would be restricted to a review of the proceedings to the end that it might be determined whether the award of the board appealed from was unauthorized as a matter of law. We think the appeal mentioned in the statute contemplates a general appeal upon both the law and facts and a trial of the cause *de novo* in the appel-

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late court before a jury, if a jury is demanded; otherwise before the court without the intervention of a jury. In this respect the proceedings would be analogous to an appeal from the decision of a district magistrate to the circuit court provided for under section 2507 R. L. 1915. The trial in the circuit court would be *de novo* regardless of whether the same is with a jury or before the court jury waived, and upon the trial in the appellate court the amount of the judgment is limited by the pleadings alone and not by the judgment from which the appeal is taken. *Jardin v. Madeiros*, 9 Haw. 503; *Bell v. Palea*, 13 Haw. 278; *Associated Repair Works v. Rogers*, 22 Haw. 91.

The appellant has called to our attention the Workmen's Compensation Act of the State of Connecticut which provides that either party may appeal from the award of the commissioner to the superior court, and appellant cites the case of *Powers v. Hotel Bond Co.*, 89 Conn. 146, where the supreme court of that State held that a trial *de novo* was not contemplated by the Connecticut Act and that the appellate court was confined to a review of the record of the commissioner to ascertain if some substantial error of law was committed. But the Connecticut statute makes no mention of a trial by jury while our own statute does so in explicit terms.

Under the Oregon Workmen's Compensation Act appeal from the decision of the commission is provided for to the circuit court and it is within the discretion of the court to submit to a jury any question of fact involved in the appeal and in which respect the Oregon law is not so broad as ours. Construing this statute the supreme court of Oregon in *Raney v. State Industrial Accident Commission*, 166 Pac. 523, said: "The state Industrial Accident Commission not being a judicial tribunal, a reexamination of any of its final determinations by a circuit court is inaugurated by procedure in the nature of a writ of review, and

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when jurisdiction of the case has thus been secured, it is to be tried *de novo* as upon appeal."

The concluding question involves the sufficiency of the notice served upon the employer to sustain the judgment of the circuit court. It is argued that the notice was confined to a description of the loss by complainant of four fingers of his hand and could not be taken as descriptive of an injury entailing the loss of the use of the hand. The notice served by the appellee contained the following statement under the heading nature and cause of injury: "Loss of four fingers of left hand. Hand cut in electric meat grinding machine while grinding meat. The undersigned therefore claims compensation under the provisions of the Workmen's Compensation Act." This subject is covered by sections 21-24 Act 221 S. L. 1915, which are as follows:

"Section 21. No proceedings under this Act for compensation for an injury shall be maintained unless a notice of the injury shall have been given to the employer as soon as practicable after the happening thereof, and unless a claim for compensation with respect to such injury shall have been made within three months after the date of the injury; or, in case of death, then within three months after such death, whether or not a claim had been made by the employee himself for compensation. Such notice and such claim may be given or made by any person claiming to be entitled to compensation or by some one on his behalf. If payments of compensation have been made voluntarily the making of a claim within said period shall not be required."

"Section 22. Such notice and such claim shall be made in writing, and such notice shall contain the name and address of the employee, and shall state in ordinary language the time, place, nature, and cause of the injury, and shall be signed by him or by any person on his behalf, or, in the event of his death, by any one or more of his dependents or by a person on their behalf. The notice may include the claim."

"Section 23. Any notice under this Act shall be given

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to the employer, or if the employer be a partnership, then to any one of the partners. If the employer be a corporation then the notice may be given to any agent of the corporation upon whom process may be served, or to any officer of the corporation, or any agent in charge of the business at the place where the injury occurred. Such notice shall be given by delivering it or by sending it by mail by registered letter addressed to the employer at his or its last known residence or place of business. The foregoing provisions shall apply to the making of a claim."

"Section 24. A notice given under the provisions of section 21 of this Act shall not be held invalid or insufficient by reason of any inaccuracy in stating the time, place, nature or cause of the injury, or otherwise, unless it be shown that the employer was in fact misled to his injury thereby. Want of notice or delay in giving notice shall not be a bar to proceedings under this Act if it be shown that the employer, his agent or representative, had knowledge of the accident or that the employer has not been prejudiced by such delay or want of notice."

It is first to be observed that neither technical nor formal pleadings are required; that one of the benefits conferred by this class of legislation is to have the proceedings as simple and informal as may be consistent with right and justice. See *Gailey v. Peet Bros. Mfg. Co.*, 157 Pac. 431. And this court has heretofore decided that laws of this nature should be liberally and broadly construed. *Re Ichijiro Ikoma*, 23 Haw. 291; *Silva v. Kaiwiki Mill Company*, 24 Haw. 324.

In the present case the complainant is a mere youth. He appeared without an attorney or other representative and filed notice of his injury in brief and simple language. He made no attempt to describe his injury in detail nor did he attempt to set forth the effect of the injury upon him from a physical standpoint. He did not claim any specific amount of compensation. Perhaps he was ignorant of the amount to which he was entitled. We think the

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notice served upon the employer described the nature of the injury with sufficient certainty to meet the requirements of the statute. The effect of the injury was then to be established by the evidence which in the trial of the cause before the circuit court was clear and uncontradicted to the effect that the employee had lost the use of his hand. Our statute does not require that the hand or any part thereof must be amputated before a claim for compensation for the loss of the use of the hand may be made. "Permanent loss of use of hand \* \* \* shall be considered as the equivalent of the loss of such hand" (Sec. 14 Act 221 S. L. 1915 as amended by Sec. 5 Act 227 S. L. 1917). An award for permanent partial disability is made not solely with regard to the direct loss of earning power by reason of the injury but with regard also to the impairment of physical efficiency for the remainder of the life of the injured employee.

From the very inception of these proceedings the appellant, insurance carrier, has been represented by an astute attorney whose opposition to the claim of appellee has from the outset been based upon highly technical grounds. Yet while the complainant as a witness before the circuit court was being interrogated and was giving answers which clearly indicated that he was claiming compensation for the loss of the use of his hand the attorney for appellant offered no objection whatsoever. The following is a part of the examination of complainant: "Q. Will you show your hand to the judge? The Court. I can see. Q. That is the first, second, third, fourth fingers of the left hand? A. Yes. Q. Were severed at the juncture of the fingers with the hand? A. Yes. Q. Leaving nothing but the thumb? A. Yes. Q. Are you able to do any work with that hand? A. I can't use the hand because the fingers are too short. Q. So you have lost the use of the hand entirely? A. Can't do anything." During the time this

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evidence was going into the record the appellant uttered no word of protest, made no complaint that by reason of an inaccuracy in the statement of the nature of the injury appellant had been misled to its injury and interposed no objection to the evidence as being outside of the issue as presented by the notice.

If the appellant was taken by surprise and misled to its injury, as it now claims, it is surprising that it remained quiescent and made no request of the court for time and an opportunity to controvert the claim of appellee as presented by him to the circuit court. And finally, even were there merit in this contention of appellant, which we do not concede, yet the attempt to raise the question in this court for the first time comes too late. *Iaukea v. Cummings*, 9 Haw. 558; *Stanley v. Akoi*, 12 Haw. 344; *Lee Lun v. Henry*, 22 Haw. 165, 168.

The exceptions are overruled.

W. T. Carden for claimant.

H. Edmondson for defendant London Guarantee & Accident Co., Ltd.

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TERRITORY v. GOO WAN HOY.

No. 1156.

## PETITION FOR REHEARING.

FILED APRIL 16, 1919.

DECIDED APRIL 23, 1919.

COKE, C. J., KEMP AND EDINGS, JJ.

*Per Curiam:* The defendant has filed a petition for rehearing alleging a number of grounds, only one of which

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merits attention. He says that we overlooked the rule of law that questions which may be put to an ordinary witness, for purposes of discrediting his testimony, may not be put to a testifying accused person but that when a defendant in a criminal case becomes a witness, cross-examination must be limited to matters pertinent to the issue and provable by other witnesses. Defendant has cited two New York cases which support this proposition (*People v. Brown*, 72 N. Y. 571 and *People v. Crapo*, 76 N. Y. 288). While the cases now cited by defendant were not examined by us, not having been called to our attention, the question therein considered was by no means overlooked by us. We expressly decided the question contrary to defendant's present contention and believe we decided it in accordance with the weight of authority, but for fear we have not made our position upon this point entirely clear we deem it proper to further set forth our views upon this important question. We doubt that the rule announced in the New York cases cited is now the law of that State. No less an authority than Mr. Wigmore has criticized the rule laid down in these cases and has expressed the belief that it is not now the law in New York. 2 Wigmore Ev. Sec. 891 (3).

We have not been able to find any New York case which expressly overrules the *Brown* and *Crapo* cases but certainly the cases of *People v. Giblin*, 115 N. Y. 196, 199, 21 N. E. 1062, and *People v. Webster*, 139 N. Y. 73, 84, 34 N. E. 730, do announce a different rule. In the *Giblin* case, the defendant who was on trial for murder became a witness and upon his cross-examination the district attorney was permitted over objection to interrogate him as to the possession of certain dies and plates and also as to whether he had not visited an engraver to obtain a die. He denied the visit but admitted the possession of the dies and plates and attempted to show that he owned them for an inno-



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cent purpose. The court said: "It was permissible to impeach the defendant's credibility by showing facts which would connect him with a nefarious occupation. It is an office of cross-examination to exhibit the improbabilities of the witness' story and in this case we do not think the prosecuting officer exceeded the proper bounds, in his endeavor to show that the defendant was not of such a character as to commend entire confidence in his statements." In the *Webster* case, also for murder, the district attorney was permitted upon cross-examination of defendant to show that he (defendant) was living in adultery with a woman unconnected with the crime charged. In discussing this the court said: "It is now an elementary rule that a witness may be specially interrogated upon cross-examination in regard to any vicious or criminal act of his life and may be compelled to answer unless he claims his privilege," also, "The extent to which disparaging questions not relevant to the issue may be put upon cross-examination, is discretionary with the trial court, and its rulings not subject to review here unless it appears that the discretion was abused."

From the above cases we think it is clear that the rule announced in the New York cases cited by defendant has been abandoned by that State and is not now the law in that jurisdiction, the rule now adhered to being entirely in accord with the rule followed by us.

From an examination of the authorities we think it is now universally held to be the law that a defendant who takes the stand and testifies in his own behalf is subject to be discredited or impeached by any method allowed in the case of other witnesses in that jurisdiction. 2 Wigmore Ev., Sec. 890; Chamberlayne's Modern Law of Evidence, Sec. 3276; *Commonwealth v. Bonner*, 97 Mass. 587; *Fletcher v. State*, 49 Ind. 130; *State v. Murphy*, 13 So. (La.) 229.

## Syllabus.

It is the law in this jurisdiction that a witness may upon cross-examination be thoroughly sifted as to his antecedents (*Republic v. Luning*, 11 Haw. 390) and in accordance with the above authorities we reiterate our holding that a defendant is subject to the same test, when he elects to become a witness in his own behalf.

The petition for rehearing is denied.

W. B. Lymer for the petition.

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C. D. LUFKIN, TRUSTEE, *v.* GRAND HOTEL  
COMPANY, LIMITED, A CORPORATION.

No. 1127.

## MOTIONS TO DISMISS.

ARGUED APRIL 8, 1919.

DECIDED APRIL 24, 1919.

COKE, C. J., KEMP AND EDINGS, JJ.

**APPEAL AND ERROR**—*costs necessary to be paid as a prerequisite to appeal.*

Items of expense incurred in the course of litigation not properly termed costs of court are not required to be paid as a prerequisite to the right of appeal.

**SAME**—*effect of service of notice of appeal on attorneys not of record.*

Notice of appeal to attorneys not shown to be of record for a party in the particular proceeding involved is not notice to that party, although they may at the time be attorneys of record for the said party in a proceeding pending in another court.

**SAME**—*adverse party defined.*

In determining whether or not one is an adverse party (and therefore entitled to notice of appeal) the supreme test is the possession of some substantial interest adverse to the interest of appellant in the order or decree appealed from.

## Opinion of the Court.

## OPINION OF THE COURT BY KEMP, J.

The matter out of which this appeal grew was originally begun in the circuit court of the second circuit on June 4, 1917, by C. D. Lufkin, trustee, against the Grand Hotel Company, Limited, sole defendant, to foreclose a mortgage and for the appointment of a receiver. On June 6, 1917, the Grand Hotel Company, Limited, filed its answer admitting that petitioner was entitled to the relief for which he prayed and joined in the request for the appointment of a receiver of its property, whereupon on June 8, 1917, a decree of foreclosure was entered as prayed for and a temporary receiver having theretofore been appointed his appointment was made permanent. Subsequent to the commencement of the foreclosure proceeding but before the foreclosure sale was had a suit was instituted in the United States district court for the district of Hawaii by certain creditors of the Grand Hotel Company, Limited, to have it adjudged a bankrupt. Prior to the foreclosure sale, which had been delayed by a temporary restraining order of the United States district court, the defendant Grand Hotel Company, Limited, was adjudged a bankrupt and Ferdinand Schnack, who had been appointed trustee in bankruptcy of its estate, procured an order from the United States district court authorizing him as such trustee to petition the circuit court for permission to intervene and defend in said foreclosure proceeding. Accordingly, on August 8, 1918, said trustee did petition the circuit court for permission to intervene, and on August 9, 1918, said motion was denied and a decree to that effect was entered on August 19, 1918, from which decree the said trustee has appealed.

The appellee, C. D. Lufkin, trustee, has filed two motions to dismiss the appeal, the first on the ground that the appellant has neglected and failed to pay the accrued costs

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on appeal as is provided by law, and the second on the ground that the appellant has not made all parties in interest parties to said appeal in that he has not made the Grand Hotel Company, Limited, a party to said appeal, nor has he served the said Grand Hotel Company, Limited, with notice of his appeal. The two motions were argued and submitted together.

Section 2508 R. L. 1915 is in part as follows: "Appeals shall be allowed from all decisions, judgments, orders or decrees of circuit judges in chambers, to the supreme court, except in cases in which the appellant is entitled to appeal to a jury, whenever the party appealing shall file notice of his appeal within five days, and shall pay the costs accrued, and deposit a sufficient bond in the sum of fifty dollars, conditioned for the payment of the costs further to accrue in case he is defeated in the appellate court, or money to the same amount, within ten days after the filing of the decision, judgment, order or decree appealed from."

It is the contention of the appellee that the provision of this section of the statute requiring the payment of the cost accrued has not been complied with.

As heretofore stated the proceeding as originally instituted sought a foreclosure of a mortgage upon real estate of defendant and the appointment of a receiver. In the decree of foreclosure the court appointed a commissioner to make the foreclosure sale. Upon the 19th day of August, 1918, when the trustee in bankruptcy filed his notice of appeal the court costs amounted to \$36.75. There had also been incurred various items of expense in connection with the litigation, such as expenses incurred by the commissioner in advertising and making sale of the land; fees of the commissioner and attorneys for petitioner, and salary and expense of the receiver, and amounting to nearly seven thousand dollars. At the time of the filing of appellant's notice of appeal and appeal there had

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been no finding by the court fixing the amount of fees, salaries and expenses which were afterwards allowed in the decree which also confirmed the foreclosure sale. In perfecting his appeal the appellant paid the item of \$36.75 court costs but paid no part of the other expenses mentioned above and it is his failure to make such payment that called forth the motion to dismiss.

So far as we are aware the question involved in this motion has never been passed upon by this court, though undoubtedly many cases in which such items of expense were incurred have come to this court either with or without such items being paid. It seems to us that the answer to movant's contention is that the items cannot be properly classed as costs of court and therefore do not fall within the statutory provision requiring the payment of the accrued cost to perfect an appeal.

Next we have the question of whether there has been a fatal omission in the serving of notice of appeal because the notice of appeal was not served on the Grand Hotel Company, Limited, the bankrupt corporation, and the sole defendant in the main case.

It is shown by affidavit that notice was duly mailed to Thompson & Cathcart, attorneys, whom the appellant alleges to be the attorneys of record for the Grand Hotel Company, Limited. The record, however, fails to disclose that said firm appeared in this proceeding for said company. In the bankruptcy proceedings in the federal court they did so appear of record and when the trustee procured his permission from the federal court to ask leave of the circuit court to intervene and defend notice of his intention to so apply was acknowledged by said firm as attorneys of record for the bankrupt. However, upon the hearing of the trustee's motion for permission to intervene, the name of Thompson & Cathcart was entered as attorneys for C. D. Lufkin, trustee,—a position inconsistent

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with appellant's contention. This was subsequent to the service of the notice above referred to and constituted notice to the trustee in bankruptcy that said attorneys did not appear in this proceeding in behalf of the bankrupt. It follows that notice to them was not notice to the Grand Hotel Company, Limited.

Cases here on appeal must necessarily have all necessary parties properly brought into court else jurisdiction cannot exist to do more than dismiss them. It is therefore necessary to determine whether under the circumstances of this case the Grand Hotel Company, Limited, is a necessary party to the appeal of the trustee in bankruptcy from the decree refusing him permission to intervene.

"It may be stated as a general rule that notice of appeal must be served upon all the adverse parties. On the other hand the notice of appeal need not, as a general rule, be served upon persons who are not adverse parties, or persons not parties to the proceedings in which the order or judgment to be reviewed was made. The term adverse parties, within the meaning of the foregoing rules, included every party whose interest in the subject matter of the appeal is adverse to, or will be affected by, the reversal or modification of the judgment, decree or order from which the appeal is taken." 2 R. C. L. p. 109, Sec. 86.

In determining whether or not one is an adverse party (and therefore entitled to notice of appeal) the supreme test is the possession of some substantial interest adverse to the interest of the appellant in the order or decree appealed from. Measured by this test can it be said that the Grand Hotel Company, Limited, was entitled to notice? It had, in another proceeding, been adjudged a bankrupt. It existed at best in name only and had theretofore surrendered all of its property to the federal court, so far as it was capable of doing so, and in no event according to the facts disclosed by the record before us could it profit

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by the decree appealed from or be detrimentally affected by a reversal or modification thereof.

Let us assume that upon a hearing of this appeal the decree refusing the permission to intervene should be overruled and that upon a hearing before the circuit judge appellant should be granted all the relief prayed for. In that event the property involved in the foreclosure would be taken over by the trustee in bankruptcy and administered together with all of the bankrupt's assets of every nature for the benefit of all the creditors of the bankrupt. According to the showing the company is hopelessly insolvent and by no chance could it be financially affected by any judgment which might be rendered upon a hearing in the event of a reversal. Under these circumstances we are unable to say that the bankrupt company can be regarded as an adverse party to the appellant, or that its interests could be detrimentally affected by any judgment that could be rendered. *Harrigan v. Gilchrist*, 99 N. W. (Wis.) 909, 926; *Galveston H. & N. Ry. Co. v. House*, 102 Fed. 112, 114.

We are of the opinion that both motions to dismiss the appeal should be overruled and it is so ordered.

*R. A. Vitousek* for the motions.

*E. C. Peters* contra.

## Syllabus.

MANUEL DO REGO *v.* H. OYAGI AND KAILI  
HALAMA.

No. 1154.

EXCEPTIONS FROM CIRCUIT COURT, SECOND CIRCUIT.  
HON. L. L. BURR, JUDGE.

SUBMITTED APRIL 4, 1919.

DECIDED APRIL 24, 1919.

COKE, C. J., KEMP AND EDINGS, JJ.

## ADVERSE POSSESSION.

Where the possession has been open, exclusive and uninterrupted for the period prescribed by the statute of limitations to bar an action for the recovery of land there is a legal presumption of a deed.

## OPINION OF THE COURT BY EDINGS, J.

This is an action of ejectment in which the plaintiff seeks to recover a certain piece or parcel of land known as apana 3, R. P. 3102, L. C. A. 6720B to Nahelu, situate in the ahupuaa of Kaonoulu, Kula, Maui, and particularly described by metes and bounds in his complaint. By stipulation the case was tried by the court jury waived.

The defendant Kaili Halama claimed the said property by adverse possession. The defendant H. Oyagi disclaimed any interest in the land except as a tenant of the defendant Halama. At the conclusion of the trial the court found "from the evidence that one Nahelu obtained the land by Royal Patent 3102, dated August 7th 1856; that Nahelu had three children: John Kalua Nahelu, Isaia Nahelu, and Kaipo (w) Nahelu, who were his heirs at law and who inherited the said property; that Isaia Nahelu conveyed his one-third interest in said property to David K. Eldridge, of Waiakoa, Kula, County of Maui, on June 5, 1885, and that the said David K. Eldridge in turn con-



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veyed his interest in the said property to Manuel do Rego, the plaintiff herein, by deed dated June 17, 1916; and that Joseph J. Fern, one of seven living children, descendants of said Kaipo, the daughter of Nahelu, conveyed all of his—the said Joseph J. Fern's—interest in said property to the said Manuel do Rego, plaintiff herein, by deed dated October 16, 1915; that by virtue of said deeds the plaintiff herein clearly has title to 16/21 parts of said property” (which said proportion of the property so found and awarded to plaintiff, we may remark parenthetically, is mathematically incorrect according to any interpretation of the evidence); that “Halama, the father of Kaili Halama, one of the defendants herein, went on the property in question over thirty years ago and built a house thereon, which house is still standing. He lived on the property until his death, which occurred some time in 1908. There is no evidence showing under what conditions Halama went on the said property, as lessee or otherwise;” that neither of the defendants has “established title to the said property by adverse possession or otherwise.”

There were several exceptions taken by the defendant-appellant and embodied in his bill of exceptions, all of which have been duly considered by this court, but a statement of the conclusions reached by this court thereon is unnecessary as no new principles of law are involved and the decision of this court upon the exception numbered 6, viz., “that said decision of the court was contrary to law, the evidence and the weight of evidence,” will be conclusive of the case.

A synopsis of the evidence introduced on the trial by the defendant-appellant is as follows: Mr. Charles Wilcox testified that he knew the property in question; that it adjoins his wife's property; that Halama, the father of Kaili Halama (defendant), occupied the premises since 1884; built the house upon them and lived there with his

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wife and children until he died some ten years back; since Halama's death Kaili has been living on the premises; Halama lived there as though he owned them—the premises were his; the property around the house is not fit for cultivation; it is just the top of an old fish pond stone wall; nothing could grow there; back of the house there used to be a pond but it is filled with sand; the house occupies nearly the whole lot (2770 sq. ft.). Sam Kuula testified that when he came to Maui in 1895 Halama was living on the place and continued to live there until he died; that after his death his boy Kaili lived in the house; that you cannot plant trees or anything else on the place. Sam Lono testified that Halama lived on the premises and built a house there; that after Halama died Kaili occupied the premises; that he heard from Halama himself thirty years ago that he owned the premises; that he knew Nahelu (the patentee); that he, Nahelu, never lived on the place, but lived about two hundred yards above the place; that he, Lono, was born there, and that Halama had married his (witness') sister. Oyagi, one of the defendants, testified that he made an agreement with Halama to have one room in his house; that he lived there eleven years, paying \$2.50 a month for the room; that after Halama died he made an agreement with Kaili for the house, and occupied it as his tenant paying him fifty dollars a year rent; that at the time he rented the room from Halama he, Halama, told him he was the owner of the place; that after the death of Halama, Kaili told him he was the owner of the place and witness paid rent to him. Kaili Halama, the defendant, testified that his father, Halama, owned the premises; that he died in 1908 in the house; that he, Halama, told him the place was his; that he had been paying taxes on it right along; that he, Halama, built the house and lived there with his family until he died; that after his (Halama's) death witness continued to live there,

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afterwards renting the place to Oyagi, who has been his (witness') tenant ever since, paying rent to him.

This evidence is uncontradicted and if it does not establish title by adverse possession in Halama, the ancestor of the defendant Kaili Halama, it is difficult to conceive a state of facts which, under the circumstances, would. The enjoyment of a corporeal hereditament, exclusive and uninterrupted for the time prescribed by the statute of prescription, is a legal presumption of a grant, not a tenancy.

Where the possession has been actual, open, and exclusive for the period prescribed by the statute of limitations to bar an action for the recovery of land, the presumption of a deed is conclusive. *Fletcher v. Fuller*, 120 U. S. 534; Chamberlayne, Evidence, Sec. 1163.

The exception is sustained, the decision reversed and the cause remanded to the circuit court for further action not inconsistent with this opinion.

*Crockett & Crockett* and *E. R. Bevins* for plaintiff.

*Enos Vincent* for defendant Halama.

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IN THE MATTER OF THE TRUST ESTATE OF  
E. COIT HOBRON.

No. 1158.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

HON. C. W. ASHFORD, JUDGE.

SUBMITTED APRIL 24, 1919.

DECIDED MAY 1, 1919.

COKE, C. J., KEMP AND EDINGS, JJ.

TRUSTS—expenses—attorney's fee.

H by deed of trust conveyed his property to L as trustee reserving to himself the income from the estate less expenses

## Opinion of the Court.

necessarily incurred in the conduct and management of the trust estate. A vacancy in the trusteeship occurred. Held that an attorney's fee for services rendered in securing the appointment of a new trustee should be paid out of the income and not out of the corpus of the estate.

## OPINION OF THE COURT BY COKE, C. J.

This is an appeal from an order of the first judge of the circuit court of the first judicial circuit presiding at chambers in equity directing the payment of \$75 out of the corpus of the trust estate as an attorney's fee for services rendered by the attorneys for the guardian of E. Coit Hobron, the trustor and life beneficiary under a deed of trust, in securing the appointment of a trustee in succession to E. C. Peters, trustee, resigned. The amount of the attorney's fee allowed is not questioned. The sole point presented by the appeal involves the propriety of the order directing the payment of the attorney's fee out of the corpus of the estate instead of out of the income thereof. In February, 1915, E. Coit Hobron conveyed to Alexander Lindsay, Jr., as trustee, an estate of the value of about \$21,000 under a trust deed, from which, for a proper understanding of the question involved, the following paragraphs are quoted:

"First. Said trustee shall, at any time he sees fit, have the power to sell said shares of stock, and invest and reinvest the funds derived from such sale in such other securities as he shall see fit, with power in his discretion to vary such investments from time to time.

"Second. All income derived from said trust fund, less expenses necessarily incurred in the conduct and management of said trust estate, shall, during the life time of said party of the first part, be paid by said trustee to said party of the first part.

"Third. After the death of said party of the first part, said trustee shall pay over all the income derived from said trust fund, less expenses necessarily incurred in the

## Opinion of the Court.

conduct and management of said trust, to Martha W. Hobron, daughter of said party of the first part until she shall attain the age of thirty years.

“Fourth. When the said Martha W. Hobron shall attain the age of thirty years, the trust hereby created shall terminate and all of the property comprising said trust estate at that time held by said trustee shall be transferred and delivered by said trustee to said Martha W. Hobron free and clear of the trust hereby created.”

Some time subsequent to his appointment Mr. Lindsay resigned as trustee and E. C. Peters was duly appointed in his stead. In September, 1918, the trustor, Hobron, was adjudged an incompetent person and E. R. Davis was duly appointed guardian of his person and estate. Thereafter E. C. Peters resigned as trustee and Hobron, by his guardian, filed a bill in equity praying for the appointment of a trustee to succeed Mr. Peters, the result being that the Trent Trust Company, Limited, was appointed trustee in succession to Peters. The attorneys who conducted this proceeding for the petitioner were allowed the sum of \$75 as an attorney's fee, which was by the circuit judge ordered to be paid out of the corpus of the estate. Martha W. Smith (nee Martha W. Hobron), one of the beneficiaries named in the trust deed, appealed from this order. The husband of Martha W. Smith, Francis H. Smith, joins her as party-appellant.

Numerous authorities, some of which are conflicting, have been cited by respective counsel, but the merits of this controversy can readily be determined by recourse alone to the language employed in the deed, for it must be conceded that if the intention of Mr. Hobron can be gathered from the instrument itself the intention thus expressed must prevail. It appears to us that the deed of trust clearly indicates the fund from which the attorney's fee involved in this controversy should be paid. First we observe an intention on the part of Hobron to have the

## Opinion of the Court.

corpus of the estate maintained intact and a further intention clearly expressed in paragraphs two and three of the trust deed to have paid out of the income of the estate all necessary expenses incurred in the conduct and management of the estate. Certainly the proper conduct and management of the estate required the appointment of a trustee in the place of the trustee who had resigned. It cannot well be contended that the trust estate could be either properly conducted or properly managed without a trustee clothed with authority to act and it follows that the expenses properly incurred in securing the appointment of a trustee in succession to one who has resigned are necessarily incurred in the conduct and management of the trust estate. We are unable to agree with counsel for appellee that this expense is either extraordinary or unusual or that the same was not contemplated by Mr. Hobron when he executed the trust deed, for it must have been in his mind at the time that before the end of the trust period one or more vacancies in the trusteeship would, or might, occur. His purpose therefore, as expressed in the deed, was to have the expense incidental to the appointment of a new trustee, in case of a vacancy in the trusteeship, paid out of the income of the estate and not out of the corpus thereof.

The order appealed from is reversed and set aside and the cause remanded to the court below for further proceedings consistent with this opinion.

*W. T. Carden* for the appellants.

*Watson & Clemons* for the guardian.

Syllabus.

TERRITORY v. A. M. CABRINHA.

No. 1165.

ERROR TO CIRCUIT COURT, FOURTH CIRCUIT.

HON. C. K. QUINN, JUDGE.

SUBMITTED APRIL 21, 1919.

DECIDED MAY 5, 1919.

COKE, C. J., KEMP AND EDINGS, JJ.

**STATUTES—section 168 R. L. 1915 construed.**

Section 168 R. L. 1915 prohibits an officer of a county from making a sale of goods or property in which he is pecuniarily interested to the county even though he take no official action in behalf of the county in consummating such sale. An indictment under said section which charges the defendant with having, in behalf of a copartnership of which he was a member and in which he was pecuniarily interested, made an agreement with the board of supervisors, of which he was a member, for the sale to the county by said copartnership of goods, wares, etc., without charging that he as such official participated in the making of said agreement, is good as against a general demurrer.

**CRIMINAL LAW—instructions.**

An instruction which authorizes the jury to convict without having found that the crime was committed by the defendant in the manner alleged in the indictment is prejudicial error.

**JURY—disagreement—discharge discretionary with trial court.**

The action of the trial court in discharging a jury and declaring a mistrial will not be reviewed by this court except on a clear showing of abuse of the discretion with which the judge is vested.

**OPINION OF THE COURT BY KEMP, J.**

The defendant, A. M. Cabrinha, was indicted, tried and convicted of a violation of section 168 of the Revised Laws of 1915 and sentenced to pay a fine of \$300 and the costs of court. The proceedings terminating in his conviction and sentence are before this court for review on a writ of

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error. The section of the statute for the violation of which the defendant was convicted is as follows:

“No officer or employee of the Territory or of any municipal or political subdivision thereof shall in any way, directly or indirectly, individually or in combination with others, make or authorize, or participate in making or authorizing, any contract or agreement, oral or written, express or implied, for the purchase or sale of any property or the performance of any work by, to or for the Territory or any such subdivision, in which contract, agreement, purchase, sale, property, performance, or work, or in any payment or consideration therefor or proceeds thereof he is or shall be in any way, directly or indirectly, as a subcontractor or otherwise, pecuniarily interested. Nor shall any such officer or employee voluntarily become interested in any way, directly or indirectly, as a subcontractor or otherwise, in any such contract or agreement or in any payment or consideration therefor or thereunder or performance or proceeds thereof, after he or any board or other body, of which he was at the time of making the contract or agreement or during the period of negotiations therefor a member, has made or authorized, or participated in making or authorizing, such contract or agreement. Provided, that in case such contract or agreement is made with a corporation, the ownership of not more than five per cent. of the capital stock of such corporation shall not be a disqualifying or prohibiting interest within the meaning of this section unless the owner of such stock shall have made or authorized, or participated in making or authorizing, such contract or agreement on behalf of such corporation as an officer, agent or employee thereof.” (Sec. 168 R. L. 1915.)

The specifications of error will not be discussed in their numerical order, nor separately, but will be grouped according to the nature of the questions raised thereby.

The first specification of error relates to the same matter decided by this court upon reserved questions and reported in *Territory v. Cabrinha*, 24 Haw. 621. The ques-



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tion raised by this specification was fully, and we think correctly, decided in our former opinion and will not be further discussed here.

The second, fourth, fifth and sixth specifications of error all involve the question of whether the prohibition of the statute is aimed solely at the official acts of an officer or includes contracts or sales which such officer may make with or to the county as a business man without taking part in such transaction in his official capacity.

We think that the statute prohibits the officer of a county from making a sale of goods or property in which he is pecuniarily interested to the county even though he take no official action in behalf of the county in consummating such sale or purchase.

The indictment in this case charges that the defendant for and on behalf of Cabrinha & Company, a copartnership in which he is alleged to be a partner and pecuniarily interested, entered into an agreement with the board of supervisors of the County of Hawaii for the sale and delivery by said Cabrinha & Company to the County of Hawaii of goods, wares and merchandise, etc. There is no allegation that the defendant as a supervisor either directly or indirectly took part in the making of said agreement with himself as the representative of Cabrinha & Company or the sales afterwards made under said agreement by said Cabrinha & Company to said county. The allegation is that he "for and on behalf of Cabrinha & Company" did certain things.

The second specification of error complains of the action of the court in overruling a general demurrer to the indictment and in his argument the defendant's sole contention is that the indictment should charge him with having participated officially in the making of the agreement or purchase. We overrule this contention and hold that as against a general demurrer the indictment is good.

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The fourth specification complains of the action of the court in refusing to allow the defendant to state whether he took any active part in the transactions charged in the indictment. The defendant while testifying in his own behalf was asked: "I show you prosecution's Exhibit 'D' and I will ask you if you took any active part in the purchase or sale or sales contained in this instrument?" This was objected to on the ground "that any such evidence is not admissible," and the objection sustained. Exhibit "D," referred to in the question, was a demand on Cabrinha & Company for the price of goods sold to the County of Hawaii in the month of July, 1917, for the sum of \$91.20, and covered by the first count in the indictment.

One of the outstanding allegations in the indictment is that the defendant, A. M. Cabrinha, acting for and on behalf of Cabrinha & Company, entered into a certain agreement with the board of supervisors of which he was at the time a member. No other overt act in connection with the agreement or the sales afterwards made to the county under the agreement is alleged to have been committed by the defendant either directly or indirectly or on behalf of the seller or the purchaser. If the allegation is not surplusage it must be proven and of course if it must be alleged and proven the defendant must be permitted to refute it if he so desires. This he attempted to do by his own testimony, but was not permitted. We do not think that the allegation was surplusage. The statute clearly designates the offense as being the making or authorizing of any contract, agreement, etc. The defendant must, therefore, participate either in behalf of the purchaser or in behalf of the seller in making or authorizing the contract in order to be amenable under the statute.

In its charge to the jury the court was dominated by the same idea that caused it to exclude the evidence we have just discussed. At the request of the prosecution the

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following two charges complained of in specifications of error five and six were read to the jury:

“No. 2. I instruct you, that if you believe from the evidence beyond a reasonable doubt, that the defendant A. M. Cabrinha was a duly elected, qualified and acting supervisor of the County of Hawaii, as alleged in said indictment; and if you further believe that the said A. M. Cabrinha, during the years 1917 and 1918 was a member of the copartnership doing business under the name of Cabrinha & Company, and financially interested in the affairs of said copartnership as alleged in the said indictment, and if you further believe that the said Cabrinha & Company sold and delivered merchandise to the County of Hawaii as alleged in any or all of the counts of this indictment, then I instruct you that it is your duty to find the defendant guilty on each count upon which proof has been offered to your satisfaction beyond a reasonable doubt; and if you further believe that proof has been offered to satisfy your minds beyond a reasonable doubt of all the counts in the indictment it will be your duty to find the defendant guilty as charged.”

“No. 4. I instruct you as a matter of law, that it makes no difference whether A. M. Cabrinha, as a supervisor, actually ordered the goods referred to in the various counts, so long as they were ordered by and delivered to an officer of the county.”

Instruction No. 2, above set out, authorized the jury to convict the defendant without his having taken part either officially or otherwise in the transactions complained of in the indictment or in fact without his even having knowledge of such transactions so long as the sales were made by the company in which he was pecuniarily interested and at a time when he was an official of the county. This authorized a conviction of the defendant without proving that he in behalf of Cabrinha & Company made the agreement with the board of supervisors as alleged in the indictment. When a crime may be committed in two or more ways and the indictment alleges that it was committed in

## Opinion of the Court.

one of the ways and does not charge that it was also committed in the other way or ways the proof must show the commission in the manner charged in the indictment. The evidence to the effect that the defendant acted in behalf of Cabrinha & Company in making the agreement with the board of supervisors is very slight if indeed it can be said that there is any evidence to that effect. The instruction which told the jury that they should convict the defendant if they found certain things to be true omitted this important element of the crime as charged in the indictment and was error highly prejudicial to the rights of the defendant.

Instruction No. 4 is also objectionable because it does not require the jury to find that the defendant had anything to do with the acts constituting the crime to justify a conviction. It is correct in stating that it makes no difference whether the defendant as a supervisor ordered the goods but when it concludes that the defendant should be convicted if they were ordered by and delivered to an officer of the county (presumably from Cabrinha & Company) again the important allegation that the defendant on behalf of Cabrinha & Company made the agreement with the board of supervisors for the sale of goods to the county is treated as surplusage and not necessary to be proven.

The one remaining question involves the court's action in placing the defendant upon trial before a second jury after having declared a mistrial and discharging the first jury which had deliberated only about one hour and twenty minutes. It was for the judge who knew the particular circumstances of the case to exercise the discretion vested in him in accordance with the principles of common law, which are recognized by our statute in declaring that "the successive disagreement of two juries empaneled to try the case shall operate as an acquittal of the accused." Sec.

## Concurring Opinion of Coke, C. J.

3782 R. L. 1915. Under the statute if the judge in the exercise of his discretion discharges two successive juries for having failed to reach a verdict the defendant would stand acquitted. For the defendant to get the benefit of this statute the court must be vested with the discretionary power of discharging a jury which has failed to agree upon a verdict after having in his judgment deliberated a sufficient length of time. The jury in this case voluntarily returned into court and informed the judge that they had not agreed and the foreman expressed the opinion that it would not be possible for them to reach an agreement, whereupon without further inquiry the jury was discharged. Such action of the trial court will not be reviewed by this court except on a clear showing of abuse of the discretion with which the judge is vested. *The King v. Davis*, 4 Haw. 213; 38 Cyc. 1855, 1856. We are unable to say that the discretion was in anywise abused in this case and therefore hold that the court correctly overruled the plea of former jeopardy.

For the errors pointed out in this opinion the judgment of conviction is reversed and the cause remanded to the trial court for further action not inconsistent with this opinion.

*J. Lightfoot*, First Deputy Attorney General, for the Territory.

*W. H. Smith* and *J. W. Russell* for plaintiff in error.

## CONCURRING OPINION OF COKE, C. J.

I agree with my associates that the judgment of conviction herein should be reversed, but I am compelled to dissent from their approval of the majority opinion in *Territory of Hawaii v. Cabrinha*, ante p. 621, sustaining the validity of the indictment under which the defendant was tried. The views entertained by me, and to which I adhere, are fully expressed in my dissenting opinion in that case.

**Syllabus.**

MARY ELIZABETH KAIHENUI *v.* EMMA AONA, W.  
H. BEERS, GUARDIAN OF A. A. KAULUKOU,  
AND W. H. BEERS, TRUSTEE.

No. 1095.

EXCEPTIONS FROM CIRCUIT COURT, FOURTH CIRCUIT.  
HON. C. K. QUINN, JUDGE.

SUBMITTED APRIL 21, 1919.

DECIDED MAY 6, 1919.

COKE, C. J., KEMP AND EDINGS, JJ.

**DEEDS—*partition.***

The fact that a party who has no interest in the property joins in a partition deed does not vest any interest in him although the deed purports so to do, there being no consideration for the grant to him.

**EVIDENCE—*common source of title.***

The fact that a plaintiff offers in evidence a conveyance which he designates as a common source of title does not preclude the defendant from contradicting such evidence and denying that any common source of title exists.

**OPINION OF THE COURT BY EDINGS, J.**

This is an action of ejectment instituted by the plaintiff-appellant in the circuit court of the fourth circuit for "all of that certain piece of land situate at Waiakea, district of South Hilo, County and Territory of Hawaii, and in the circuit aforesaid, being a part of Royal Patent 1873, Land Commission Award 5157, to Kuahopu" and "containing an area of 4  $\frac{3}{10}$  acres." The case was tried by the court without the intervention of a jury, the same having been expressly waived. At the conclusion of the trial the court rendered a decision in favor of the defendants and against the plaintiff.

In 1855 Kuahopu obtained a Royal Patent, 1873, L. C. A. 5157, for 12.20 acres of land of which the land in question

## Opinion of the Court.

formed a part (Defendants' Exhibit 3). In 1865 Kuahopu devised this land to Kapumauu (w) (Defendants' Exhibit 2). In 1873 Kapumauu (w) by deed conveyed this land to her two granddaughters, Emma Kaaewaihau and Emele Kamakaoumi, who were sisters. Emele Kamakaoumi married Thomas Forbes and had issue, the "Forbes minors" mentioned in the alleged partition deed (Plaintiff's Exhibit B). Kaaewaihau had issue, Aki Aona also called Charles Aki Aona, and Ahong also called A. A. Kaulukou. Aki Aona died April 2, A. D. 1911 (Plaintiff's Exhibit E), leaving him surviving a daughter, Emma Aona. Kaaewaihau died insane and intestate January 10, A. D. 1912 (Plaintiff's Exhibit F), leaving as her heirs at law her son, A. A. Kaulukou, and a granddaughter, the said Emma Aona, the daughter of her deceased son, Aki Aona.

The plaintiff bases her claim to her alleged interest in the said property upon a deed from Charles Aki Aona to (her) Mary Elizabeth Kaihenui, dated November 24, 1906 (Plaintiff's Exhibit C), wherein and whereby the said Charles Aki Aona conveyed the entire tract of land containing an area of 4 3/10 acres and also upon a certain alleged partition deed made and executed between B. H. Brown, guardian of Kaaewaihau (w), an insane person, B. H. Brown, guardian of Ah Hung (k), a minor son of Kaaewaihau, Aki (k), a son and heir of Kaaewaihau, Thomas Forbes and Thomas Forbes, guardian of Mary Forbes, John Forbes, Thomas Forbes, Jr., and Emma Forbes, the minor heirs of Kamakaoumi, deceased, dated February 1, 1904, and acknowledged March 14, 1904 (Plaintiff's Exhibit B), which last conveyance plaintiff also claims to be the common source of title whereby both the plaintiff and defendants claim. This claim of a common source of title is repudiated and denied by the defendants.

The first exception taken upon the trial by the plaintiff-

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appellant was to the introduction in evidence by the defendants of a certain deed from Kapumauu to Kaaewai-hau (w) and Kamakaoumi, dated September 20, 1873, "upon the ground that it is incompetent, irrelevant and immaterial; that it violates the estoppel which works against the two defendants in this case by showing or attempting to show the title beyond the common source of title which is (plaintiff's) Exhibit 'B' in this case."

The estoppel relied upon by the plaintiff-appellant in this exception is not discernible. Estoppels are created by the party to be bound and are not manufactured by his opponent and cast upon him. We have failed to discover, in the record, any evidence tending to show any act or omission on the part of the defendants which could be construed as an estoppel, nor has the plaintiff-appellant even availed herself of the benefit of the statute in this jurisdiction upon "title through a common source" (Act 80, S. L. 1915). The fact that a plaintiff offers in evidence a conveyance which he designates as a common source of title does not preclude the defendant from disputing and contradicting such evidence and denying that any common source of title exists and of establishing the fact that he claims from a different source unless he is estopped by some act or omission of his own from so doing. *Harrison v. Davis*, 22 Haw. 55. This exception we regard as without merit and the same is overruled.

It may not be inappropriate at this time to consider the two instruments (Plaintiff-appellant's Exhibits B and C) under and by virtue of which she claims an interest in the property described in her complaint and upon the validity of which claim depends her right to recover in this action. Exhibit B, purporting to be a partition deed entered into between B. H. Brown, guardian of Kaaewaihan (w), an insane person, B. H. Brown, guardian of Ah Hung (k), a minor son of Kaaewaihan, Aki (k), a son and heir of Kaaewaihan, Thomas Forbes and Thomas Forbes, guardian



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of Mary Forbes, John Forbes, Thomas Forbes, Jr., and Emma Forbes, the minor heirs of Kamakaoumi (w) deceased. The Aki mentioned in this conveyance is also known as Charles Aki Aona and was a son of Kaaewaihau (w), who at the time of the execution of this conveyance was an inmate of the insane asylum at Honolulu and who survived the said Aki (Charles Aki Aona) several months. The said Aki, plaintiff's grantor, joins in this alleged partition deed but we are unable to discover from the record for what purpose, as he was a stranger to the title and did not possess any interest in the land so granted and consequently was estopped from receiving any under this instrument. The attempted grant of any interest in the property to him by said partition deed being void it follows that his (Aki's) deed to the plaintiff-appellant (Exhibit C) of any interest in this property is necessarily a mere nullity as up to the time of his death, which occurred during the lifetime of his mother (Kaaewaihau), the record does not disclose that he at any time became seized of an interest in the land. We are therefore forced to the conclusion, and so decide, that the plaintiff-appellant has failed to sustain her claim or support her action by any evidence whatsoever and this action might well have been disposed of by the trial court upon the conclusion of plaintiff-appellant's evidence.

There were a number of exceptions taken by the plaintiff-appellant during the course of the trial and to the decision, all of which have received due consideration by this court but we do not deem it necessary to comment thereupon as they are one and all without merit.

The exceptions are overruled, the decision affirmed and the cause remanded to the circuit court for further proceedings consistent with this opinion.

*Carlsmith & Rolph* for plaintiff.

*J. W. Russell* for defendants.

## Syllabus.

TERRITORY v. THERESA OWANA KAOHELELANI  
WILCOX BELLIVEAU.

No. 1142.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

HON. W. H. HEEN, JUDGE.

ARGUED MAY 2, 1919.

DECIDED MAY 10, 1919.

COKE, C. J., KEMP AND EDINGS, JJ.

CONSPIRACY—*indictment—allegations—means and object of conspiracy.*

Where the indictment charges a conspiracy to do an unlawful act it is unnecessary to set out the means by which the act was to be accomplished.

SAME—*same—same—same.*

The reverse is true where the object of the conspiracy is not necessarily unlawful and the criminality of the conspiracy depends upon the unlawfulness of the means contemplated to accomplish the object. In such a case the rule is that the indictment must set out the means that the court may see that there is a criminal conspiracy.

TRIAL—*evidence—order of proof.*

The order of proof is a matter largely within the discretion of the trial court. Especially is this true in a prosecution for conspiracy where the facts are ordinarily complicated and involved.

## OPINION OF THE COURT BY COKE, C. J.

The defendant-appellant, Theresa Owana Kaohelalani Wilcox Belliveau, was, together with James M. Kealoha and Samuel K. Kamakaia, indicted by the grand jury for the crime of conspiracy in the first degree. The indictment contains two counts. The first count charges a conspiracy to forge the will of a then living person, to wit, Liliuokalani, former Queen of the Hawaiian Monarchy, and the second count charges a conspiracy to commit the

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crime of perjury and subornation of perjury in order to obtain the probate of the forged will. At the trial of the cause the prosecuting attorney entered a nolle prosequi as to the defendant Samuel K. Kamakaia. The cause then went to trial before a jury which returned a verdict of guilty against the appellant Belliveau upon the first count of the indictment and acquitted her upon the second count. The defendant Kealoha was found guilty upon both counts of the indictment. The appellant Belliveau thereupon interposed a motion for a new trial which was overruled by the court and sentence was then imposed upon her. She now comes to this court upon exceptions, sixteen in all, alleging errors for which she asks a new trial.

At the outset it is contended by the defendant that the trial court erred in overruling her demurrer to the first count of the indictment, for the reasons, as we understand her claim to be, that said first count fails to sufficiently specify the means used by defendants in conspiring to defraud certain persons of their right of property, and also fails to allege the facts constituting the crime of forgery or the means through which the defendants intended to commit the crime of forgery.

The first count of the indictment, omitting the formal portion thereof, charges "that Theresa Owana Kaohelani Wilcox Belliveau, James M. Kealoha and Samuel K. Kamakaia, of the City and County of Honolulu, Territory of Hawaii, in the first judicial circuit aforesaid, at the City and County of Honolulu, Territory of Hawaii, and in the circuit aforesaid and within the jurisdiction of this honorable court, on the 29th day of August, in the year of our Lord one thousand nine hundred and seventeen, did unlawfully, maliciously and fraudulently combine, confederate, mutually undertake, conspire and concert together to commit the crime of forgery, by then and there, unlawfully and feloniously, deceptively and fraudulently,

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preparing, having prepared, making, having made, procuring, having procured, forging, having forged, counterfeiting and having counterfeited a certain writing to wit, a will of one Liliuokalani, dated August 29th A. D. 1917, said Liliuokalani being then and there a living person, said will purporting to be made, published and declared by said Liliuokalani as the last will and testament of said Liliuokalani, and subscribed by said Liliuokalani and declared by said Liliuokalani, to be the last will and testament of said Liliuokalani, in the presence of said Liliuokalani and in the presence of James M. Kealoha and Samuel K. Kamakaia, and to be attested by said James M. Kealoha and Samuel K. Kamakaia as attesting witnesses according to law, as being true and genuine according to its apparent purport, said will involving or affecting the amount or value of more than one hundred dollars (\$100.00), with intent in them, the said Theresa Owana Kaohelani Wilcox Belliveau, James M. Kealoha and Samuel K. Kamakaia, to defraud, deceive and prejudice another or others, in his or their rights of property, they the said Theresa Owana Kaohelani Wilcox Belliveau, James M. Kealoha and Samuel K. Kamakaia, then and there and at the time when they so prepared, had prepared, made, had made, procured, had procured, forged, had forged, counterfeited, and had counterfeited said will as aforesaid, well knowing the same to be false, forged and fraudulent, and did then and there and thereby commit the crime of conspiracy in the first degree."

The statutes of the Territory of Hawaii defining the crime for which the defendants were indicted may be briefly summarized as follows:

"A conspiracy is a malicious or fraudulent combination or mutual undertaking or concerting together of two or more to commit any offense" (Sec. 4076 R. L. 1915).

"Conspiracy to \* \* \* commit a felony \* \* \* or to forge or counterfeit \* \* \* to an amount exceeding one hundred dollars is in the first degree" (Sec. 4084 R. L. 1915).

"It is forgery \* \* \* to make a false will of a living person" (Sec. 3959 R. L. 1915).

## Opinion of the Court.

In a prosecution for criminal conspiracy to do an unlawful act the indictment need only show that the purpose of the conspiracy is unlawful by stating its object, the essence of the offense being the unlawful agreement for an unlawful purpose. In other words, the conspiracy itself is the gist of the crime and the general rule, in criminal prosecutions for conspiracy, is the indictment must contain a statement of the facts relied upon as constituting the offense in ordinary and concise language, with as much certainty as the nature of the case will admit, in such a manner as to enable a person of common understanding to comprehend what is intended, and with such precision that the defendant may plead his acquittal or conviction to a subsequent indictment based upon the same facts. Where, as in the present case, the indictment against the defendants charges a conspiracy to do an unlawful act it is unnecessary to set out the means by which the act was to be accomplished. The reverse is true where the object of the conspiracy is not necessarily unlawful and the criminality of the conspiracy depends upon the unlawfulness of the means contemplated to accomplish the object. In such a case the better rule is that the indictment must set out the means that the court may see that there is a criminal conspiracy. "An indictment alleging a conspiracy to suborn perjury need not, with technical precision, state all the elements essential to the commission of the crime of subornation of perjury and of perjury." *Williamson v. United States*, 207 U. S. 425; *Knauer v. United States*, 237 Fed. 8; *The King v. Ho Fon*, 7 Haw. 757. The indictment in this case sufficiently embraces all of the necessary elements of the crime charged and the demurrer was properly overruled.

Various other exceptions of the appellant involve the admission of the evidence of sundry witnesses for the prosecution introduced before the alleged conspiracy to

## Opinion of the Court.

forge the will had been established. The order of proof is a matter largely within the discretion of the trial court. Especially is this true in a prosecution for conspiracy where the facts are ordinarily involved and complicated. The government has the right to show the whole history of the conspiracy from its commencement to its conclusion and to do this it may, prior to the introduction of evidence of the conspiracy itself, offer evidence of admissions made by the defendants and other facts and circumstances which, standing alone, would appear immaterial but which are to be connected up and made material by evidence to follow. In *Territory v. Soga*, 20 Haw. 71, it was held that in a criminal conspiracy case the order of proof is immaterial. See *The King v. Anderson*, 1 Haw. 41; 12 C. J. Sec. 227, pp. 634-635.

Appellant's exception to the admission of the evidence of R. W. Breckons as an expert on handwriting is without merit. This same subject has recently had the attention of this court and was disposed of adversely to the contention of appellant. See *Kamahalo v. Coelho*, ante p. 689.

The remaining exceptions have to do with the instructions. The first embraces the refusal of the court to give to the jury numerous instructions requested by the appellant; and the appellant further complains of a large number of instructions given to the jury by the court at the request of the prosecution. These instructions are altogether too numerous and too lengthy to bear quoting in this opinion. It is sufficient to say that after a careful consideration of the instructions as a whole we are convinced that they correctly expressed the law and in a comprehensive manner embraced every phase of the case upon which the court was required to instruct the jury. A large number of appellant's instructions refused by the court, and of which refusal she now complains, were substantially covered by the court in other instructions.

## Opinion of the Court.

The motion for a directed verdict and the denial by the court of the appellant's motion for a new trial involve also the contention of the appellant that the evidence fails to show that the appellant's coconspirators, Kealoha and Kamakaia, or either of them, ever entered into a conspiracy with the appellant to forge the will of Liliuokalani. There was an abundance of evidence at the close of the case for the prosecution as well as at the time it was finally submitted to the jury to sustain a conviction of the appellant. The evidence overwhelmingly established that the scheme to forge the will of Liliuokalani was the original plan of Mrs. Belliveau, the appellant; that hers was the master mind and the guiding hand in the plot; that she persuaded Kealoha and Kamakaia to join her in the conspiracy, it being understood that they were to act as attesting witnesses to the forged will; that the appellant had the will prepared in writing and that she forged thereto the name of Liliuokalani; that Kealoha and Kamakaia then signed the will as witnesses and over their signatures falsely certified that the same was signed by Liliuokalani in the presence of each and both of them and was by her declared in the presence of each and both to be her last will and testament and that they at her request and in her presence and in the presence of each other signed their names as attesting witnesses. The evidence shows that through the instrumentality of the appellant this forged and fraudulent will was offered for probate in the circuit court of the first judicial circuit; that at first both Kealoha and Kamakaia vouched for its genuineness but that shortly before the hearing of the petition for the probate of the will Kamakaia relented and exposed the conspiracy. The will was forged on the 29th of August, 1917. It was known to Mrs. Belliveau at that time that Liliuokalani was aged and infirm and that her death was fast approaching. Liliuokalani died November

## Syllabus.

11, 1917. Mrs. Belliveau was also well aware that the former Queen was possessed of a large and valuable estate and it was her plan through the medium of the forged will to secure to herself and her children a large portion of this estate — a brazen and diabolical scheme to plunder and loot the estate of the dead ex-Queen. Appellant was fairly tried, properly convicted and richly deserves the punishment which her sentence prescribes.

All of appellant's exceptions, after full consideration being found devoid of merit, are overruled.

*C. S. Davis*, Second Deputy City and County Attorney (*A. M. Brown*, City and County Attorney, and *A. M. Cristy*, First Deputy City and County Attorney, with him on the brief), for the Territory.

*Andrews & Pittman* for defendant.

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THE FIRST BANK OF HILO, LIMITED, *v.* C. K. MAGUIRE AND SOLOMON LALAKEA, ADMINISTRATOR OF THE ESTATE OF T. K. LALAKEA, DECEASED.

No. 1161.

MOTION TO QUASH WRIT OF ERROR.

ARGUED APRIL 21, 1919.

DECIDED MAY 26, 1919.

COKE, C. J., KEMP AND EDINGS, JJ.

APPEAL AND ERROR—*service of assignments of error.*

Where a statute prescribes that service of process upon one of several joint makers of a promissory note shall be service upon all, the same method of service of the assignments of error is sufficient the same being constructive service upon all under the statute.



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OPINION OF THE COURT BY EDINGS, J.

This is a motion by the defendant in error, Solomon Lalakea, administrator of the estate of T. K. Lalakea, deceased, to quash a writ of error issued in that action upon the ground "that no service of a copy of the assignment of errors herein has been made upon C. K. Maguire, defendant above named, or upon his personal representative." The action was instituted by the plaintiff, the First Bank of Hilo, Limited, a corporation, against C. K. Maguire and T. K. Lalakea upon a certain promissory note for \$185 made and executed by the said Maguire and Lalakea to the said corporation. While both of said makers of said note were made parties to said action the defendant Maguire was not served with process. The defendant T. K. Lalakea died and the administrator of his estate, Solomon Lalakea, the defendant in error, as his representative, filed an answer. The defendant Maguire did not appear. Section 2374 R. L. 1915 provides:

"It shall be necessary to join as defendants in a civil action, all the joint and several, or joint makers of promissory notes, or drawers of drafts, bills of exchange, or orders, or joint and several obligors, lessees or parties of the first or second part to covenants, agreements and contracts, in suing for nonpayment, nonacceptance, or non-fulfillment thereof, but it shall in no case be necessary to serve all the joint parties sued with process. Service of process upon one of several defendants at law, shall be legal service upon all for the purposes of appearance in court, and judgment may be entered against all such co-defendants thereon; provided, however, that no execution shall issue against the sole property of any joint defendant on whom process was not duly served as aforesaid."

By the terms of the statute it was necessary to make all of the joint makers of this note parties to an action upon it but it was not necessary to serve with process all of the parties to such action, the statute specifically providing

## Opinion of the Court.

that "it shall in no case be necessary to serve all the joint parties sued with process. Service of process upon one of several defendants at law, shall be legal service upon all for the purposes of appearance in court."

If under this statute it is necessary to personally serve but one of the several joint makers of a promissory note in order to authorize a judgment against all, service of process upon one being declared to be legal service upon all for the purpose of appearance in court, we can see no valid or logical reason for requiring any different method of service of the assignments of error in this proceeding. If constructive service of process upon Maguire, had by serving his comaker Lalakea, was sufficient to authorize a valid judgment against him in the court below the same kind of constructive service was sufficient to give him notice of this proceeding. If on the other hand the constructive service had upon Maguire below was insufficient to support a judgment against him then he was a party to the proceedings had in the court below in name only and cannot be adversely affected by any judgment that may be rendered herein, and under these circumstances would not be entitled to service of the assignments of error.

We do not find it necessary to decide, and do not decide, whether or not a valid judgment could in fact have been rendered against Maguire upon the constructive service had as our conclusion as to a proper disposition of this motion is not affected thereby.

The motion to quash is overruled.

*W. H. Smith* for the motion.

*C. S. Carlsmith* contra.

Syllabus.

THE FIRST TRUST COMPANY OF HILO, LIMITED,  
*v.* A. M. CABRINHA.

No. 1151.

EXCEPTIONS FROM CIRCUIT COURT, FOURTH CIRCUIT.  
HON. C. K. QUINN, JUDGE.

ARGUED APRIL 28, 1919.

DECIDED JUNE 5, 1919.

COKE, C. J., KEMP AND EDINGS, JJ.

**JURY**—*effect of demand for trial by.*

The filing of a demand for a jury trial by either of the parties within the time prescribed by the statute fixes the status of the case as one to be tried by a jury.

**SAME**—*same—waiver of jury by parties.*

The filing of a demand for a jury trial by one of the parties fixes the status of the case as one to be tried by a jury and this status cannot be changed except by agreement of the parties or by conduct amounting to a waiver of their right to a jury trial.

**SAME**—*time within which demand for trial by jury may be made.*

A statute which provides that written demand must be filed "within ten days after the case is at issue" fixes the last day upon which a demand may be filed but does not require the case to be at issue before the demand may be filed.

**SAME**—*demand for jury contained in prayer of complaint held insufficient.*

Including in the prayer of the complaint the statutory form of prayer for process that the defendant be cited to "appear and answer this complaint before a jury of this country" does not constitute such demand for a jury trial as is contemplated by the statute.

**VENDOR AND PURCHASER**—*forfeiture—waiver.*

The clause in a contract of sale of real estate reserving to the vendor the right to declare a forfeiture for failure of the vendee to make payments as agreed may be waived but it is a general rule that mere indulgence or silence will not be construed as a waiver unless some element of estoppel can be invoked.

**SAME**—*same—same.*

In the absence of other circumstances the acceptance by the

## Opinion of the Court.

vendor of payments past due does not relieve the vendee from his obligation to make subsequent payments promptly, nor will it operate to estop the vendor from declaring a forfeiture for failure to make such subsequent payments.

## OPINION OF THE COURT BY KEMP, J.

This is an action in ejectment by the First Trust Company of Hilo, Limited, plaintiff, against A. M. Cabrinha, defendant, to recover possession of certain real estate which the defendant had contracted to purchase from the plaintiff and for which he agreed to pay at the rate of fifty dollars per month, payments to begin September 1, 1916, and fifty dollars on the first day of each month thereafter until the purchase price is paid in full. In the instrument evidencing the agreement time was declared to be of the essence of the contract. A forfeiture of the contract was declared by the plaintiff on May 31, 1917, and a reentry made upon the land. The circumstances under which the forfeiture was declared and the reentry made will be discussed in connection with the question of whether or not there had been a waiver by the plaintiff of its right to declare such forfeiture.

The case was tried by the court without a jury and resulted in a decision and judgment in favor of the plaintiff. Defendant is here on exceptions two in number which we will discuss.

Exception was taken by the defendant to the overruling of his oral motion for a jury made in open court on the day of the trial. The complaint was filed on the 4th day of June, 1917. On June 23, 1917, the defendant filed his answer which was a general denial of the allegations of the complaint and a special plea of tender. No further pleadings were filed and on March 19, 1918, the case was tried before the court without the intervention of a jury. When the case was called for trial on March 19, 1918, the

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defendant moved the court for a trial by jury but the court held that he had waived his right to a jury and overruled his motion. A portion of the prayer of the complainant is that the defendant be cited to "appear and answer this complaint before a jury of this country" and it is now contended by defendant that this language contained in the prayer of the complaint fixed the status of the case as a jury case. So much of our statute governing the demand for and waiver of a jury as is applicable to this question is as follows:

"Issues of fact \* \* \* shall be tried by the court without a jury unless a jury trial is demanded by either party" (Sec. 2377 R. L. 1915).

"Either party to a civil suit may demand a trial by jury by a written document filed in court within ten days after the case is at issue; provided, however, that if no such demand as aforesaid shall be made for a trial by jury parties to said cause shall be deemed to have waived trial by jury" (Sec. 2379 R. L. 1915).

No written demand for a trial by jury was filed by the defendant at any time and no demand was filed by the plaintiff other than that contained in the prayer of the complaint above quoted. Prior to 1909 our statute provided that "Issues of fact \* \* \* shall be tried by a jury unless a jury trial be waived by the parties with the consent of the court" (Sec. 1744 R. L. 1905), and "The parties to a civil suit may, with the consent of the court, waive the right to a trial by jury, either by written consent or by oral consent in open court entered on the minutes" (Sec. 1746 R. L. 1905). By Act 23 S. L. 1909 section 1744 was amended so as to provide that "Issues of fact \* \* \* shall be tried by the court without a jury unless a jury trial be demanded by either party" and section 1746 was amended so as to provide that "Either party to a civil suit may demand a trial by jury either by a written docu-

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ment filed in court or by oral demand made in open court within five days after the case is at issue and entered in the clerk's minutes." It is apparent that these amendments effected a reversal of the attitude of the legislature toward jury trials. Prior to the 1909 amendments jury trials were favored over trials before the court and no trial would be had without a jury unless the jury trial was waived. Under the later statute the trial without a jury is the more favored and no jury trial is to be had unless demanded by one of the parties and a failure of both parties to file a demand is declared to be a waiver. The attitude of the legislature toward jury trials has not changed since the 1909 amendments though the manner in which a jury may be demanded has been further restricted so that now a jury can be demanded only by a written document filed in court within ten days after the case is at issue.

Under the statute as it was prior to 1909 this court held that the right of trial by jury in civil cases may be waived by actions or conduct as well as expressly. *Ah Hing v. Ah On*, 15 Haw. 59. The present statute expressly provides that a failure to demand a jury trial shall be deemed to be a waiver of the right thereto. It is therefore clear that a jury trial may be waived by inaction as well as by the positive act of the parties. The question here is, has there been such waiver by the parties to this action? Because of the fact that the demand upon which defendant relies as having prevented a waiver of a jury trial was not filed by him but was filed by his opponent it becomes necessary for us to determine whether the defendant has a right to claim the benefit of the plaintiff's demand. In other words, conceding for the present that the demand of the plaintiff was in compliance with the statute; could he by abandoning his demand for a jury cause the case to revert to its former status as a case to be tried without a

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jury as though no demand for a jury had been filed by either of the parties? We are satisfied that an interpretation of the statute in accordance with the legislative intent requires us to hold that the filing of a demand for a jury trial by either of the parties within the time prescribed by the statute fixes the status of the case as one to be tried by a jury and that it would thereafter take the same character of action by the parties to change that status as was required under the statute prior to 1909. At that time it required a waiver by both parties to change the status of the case from a jury case to a jury-waived case. So we think that where the status of the case has been fixed as a jury case by the filing of demand for a jury trial by one of the parties to the action that such status cannot be changed except by agreement of the parties or by conduct amounting to a waiver of their right to a jury trial.

Let us next consider whether or not, subsequent to the filing of the complaint in this case, there has been such conduct of the parties as amounts to a waiver of a jury trial. Certainly the plaintiff by opposing defendant's insistence for a jury has consented to a trial without a jury and has therefore waived its right in this respect. As to the defendant it seems that he appeared in court upon one occasion when the case was called for trial jury-waived after having been set for trial on that date and announced ready without claiming a right to a jury trial, and the clerk's minutes show that when defendant's motion for a jury was overruled on March 19, 1918, defendant through his attorney consented to the case being tried at that time jury-waived. This we think constituted a waiver on the part of the defendant.

This leaves only the question of whether the demand in this case was filed within the time required by the statute

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and was sufficient in substance to constitute a demand for jury trial.

The plaintiff has argued that even if the language of the prayer is sufficient to constitute a demand it was not a compliance with the statute as to time of filing which provides that the written demand must be filed "within ten days after the case is at issue." It is its contention that a demand filed prior to the case being at issue is premature. We think, however, that the statute fixes only the last date upon which a demand may be filed and that a demand filed at any time prior to the expiration of the time would be a compliance with the terms of the statute. The decisions of this court as to the filing of notice of appeal which have been cited by plaintiff do not appear to us to be authority for his contention in this case, neither does the holding of the Maryland court in *Baltimore City Pass. Ry. Co. v. Nugent*, 86 Md. 349, 38 Atl. 779, to the effect that the demand must be a separate and distinct act evidenced by a writing different from the pleadings, have any bearing on the question here as will be seen by reference to the reasons assigned by that court for its holding.

We do not think, however, that the demand contained in the prayer of the complaint was sufficient in substance to constitute a demand for a jury trial. It is merely the statutory form of prayer for process as the same has existed since at least 1905 as will be seen by reference to section 1713 R. L. 1905 and section 2345 R. L. 1915, and does not constitute a demand for a jury trial. This question might well have been disposed of on this ground alone but we have preferred to rest our decision upon other grounds as well.

Under the other exception it is urged that plaintiff could not terminate the rights of defendant under said contract at the time he made the reentry and brought his



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suit because it is claimed that the circumstances of this case constitute a waiver of the strict right to terminate the contract without notice; that plaintiff by reason of the facts of this case was under the necessity of giving notice to defendant of his intention to terminate said contract and to allow a reasonable time for compliance with the terms after service of the notice before declaring a forfeiture.

The circumstances under which the forfeiture was declared and reentry made are, as shown by evidence and the findings of fact by the court, that the contract in question was entered into on August 18, 1916, by the terms of which the defendant agreed to pay \$2250 for the land in question in monthly instalments to be paid on the first day of each month beginning September 1, 1916. The contract provided that if any instalment of principal was not paid when due, plaintiff had the right to enter upon the land and terminate defendant's right of occupancy and should be entitled to commence proceedings for the recovery of the land. Time was declared to be of the essence of the contract. The instalment of principal due September 1, 1916, was paid October 13, 1916; the instalment due October 1, 1916, was paid November 13, 1916, and the instalment due November 1, 1916, was paid December 22, 1916. No other payments were made although monthly statements of the amounts due were sent to defendant and on May 29, 1917, the plaintiff sent a statement to the defendant showing that the instalments falling due from December 1, 1916, to May 1, 1917, both inclusive, were at that time unpaid. On May 30 or 31 the defendant and plaintiff's manager had an interview at which the defendant's failure to pay these unpaid instalments was discussed. As to what took place at this time and on June 1, 1917, the evidence is conflicting, but the court in its decision has found that the evidence of Mr. Mariner,

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plaintiff's manager, as to what took place is true and that the evidence of defendant in that regard is untrue. All of the facts relied upon by the trial judge in his decision are supported by evidence the credibility of which he is the one to judge and his findings of fact will not be questioned by this court. The testimony found to be true is to the effect that the statement of account dated May 29, 1917, which contained an item of \$300 for six monthly instalments (December 1916 to May 1917, both inclusive) was called to the attention of Mr. Bartels, agent of defendant, who called it to the attention of the defendant on May 30 or 31, 1917, and on the same day the defendant and Mr. Bartels called upon Mr. Mariner in regard to the account and a heated discussion ensued, brought about by the inclusion in the statement of an item amounting to about \$230, which had nothing to do with the contract involved in this case. The defendant disputed the validity of this item but expressed a willingness to pay the \$300 item, as Mr. Mariner put it, some time in the future. Mr. Mariner denied that he refused to accept the \$300 unless the other item was also paid and denied that defendant offered to pay the \$300 then and there. Mr. Mariner also testified, and the court found, that at no time was there an agreement on the part of the plaintiff to a modification of the terms of the contract or an extension of the time of payments.

It is argued that the forfeiture clause of the contract has been waived by the conduct of the plaintiff. It is true that the forfeiture clause of a contract may be waived where the party entitled to the forfeiture either by his statements or a course of conduct leads the other party to believe that he will not insist on a forfeiture. It is a general rule that mere indulgence or silence cannot be construed as a waiver unless some element of estoppel can be invoked. *Long v. Clark*, 135 Pac. (Kan.) 673;

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*Bartelsville Oil & Imp. Co. v. Hill*, 121 Pac. (Okl.) 208; *Wood v. Planters' Oil Mill*, 76 Ark. 570, 90 S. W. 18.

It seems to be well settled that in the absence of other circumstances the fact that the vendor has indulged the vendee by accepting payments after they were due furnishes no excuse for his not meeting the subsequent payments promptly, nor will it operate to prevent the vendor from declaring a forfeiture for failure to make such subsequent payments when due. 2 Warvelle on Vendors, 2 ed., Sec. 820; 39 Cyc. p. 1395.

To constitute a waiver otherwise than by express agreement there must be unequivocal acts or conduct of the vendor evincing the intent to waive. Nothing short of this will amount to a waiver. Conduct of the vendor which does not clearly show that he regards the contract as in full force and effect does not establish a waiver of a prior breach. 39 Cyc. p. 1392 (c). There was no waiver in this case by express agreement. The trial court has found upon conflicting evidence that there was no such agreement. But the defendant insists that the sending of a statement of the amount due under the contract on May 29, in connection with the other facts, constituted a waiver of all breaches prior to that date; that he thereby treated the contract as still valid and subsisting and will not be heard to say otherwise now. In *Gray v. Pelton*, 135 Pac. (Ore.) 755, it is held that a waiver may be made by express agreement to that effect or "by unequivocal acts or demeanor affording reasonable and proper inducement for the purchaser in reliance thereon to alter his course as to strict and punctual compliance, either in advance or after the prescribed time."

Can it be said that there was more than mere indulgence or nonaction on the part of the vendor in this case or that there was conduct or action having in it the elements of estoppel or from which the defendant could rea-

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sonably infer that the right to declare a forfeiture had been waived? Defendant's argument is based largely on a state of facts testified to by himself to the effect that the plaintiff through its manager, Mr. Mariner, agreed to an extension of the time of payment, but as we have already pointed out the court found upon conflicting evidence that no such agreement was made. This leaves us with nothing but the acceptance of three instalments, which were when paid six or seven weeks overdue, and a failure to declare a forfeiture until six monthly instalments were due and not then until a futile attempt was made to collect the overdue instalments twenty-nine days after the last of said six instalments became due. We have already seen that mere indulgence or nonaction is not sufficient to constitute a waiver of the right to declare a forfeiture because of failure to make other payments when they become due but the defendant insists that the action of plaintiff in demanding payment of the six past-due instalments on May 29 was a waiver of its right to declare a forfeiture for a failure to pay any or all of said instalments. It seems to us that if by reason of defendant's failure to pay the instalment due May 1 the plaintiff had the right to declare a forfeiture at any time after the default and prior to the time of making demand for payment on May 29 it would be a strange doctrine that would deprive it of that right afterwards because of its having given the defendant a chance to pay the overdue instalments and thereby remove the cause of forfeiture. Such a doctrine would place a penalty on open and fair dealing and cannot be sanctioned by this court.

It is our conclusion that there was no waiver of the right to declare a forfeiture; that the acceptance of the three past-due instalments did no more than extinguish the right to declare a forfeiture for failure to pay such instalments as were then in default; that the failure to

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promptly declare a forfeiture for the subsequent defaults amounted to no more than an indulgence of the defendant and did not have the effect of waiving plaintiff's right to declare a forfeiture for each succeeding default, and finally that the sending of the statement of amount due on May 29 and the demand for payment on the following day amounted to no more than an admission that a forfeiture had not at that time been declared and did not have the effect of waiving plaintiff's right to declare a forfeiture for nonpayment of the instalment due on May 1.

The exceptions are overruled.

*S. S. Rolph* (*Carlsmith & Rolph* on the brief) for plaintiff.

*W. B. Lymer* (*J. W. Russell* with him on the brief) for defendant.

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HAWAIIAN PINEAPPLE COMPANY, LIMITED, A CORPORATION, v. MASAMARI SAITO AND LIBBY, McNEILL & LIBBY OF HONOLULU, LIMITED, A CORPORATION.

No. 1135.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

HON. C. W. ASHFORD, JUDGE.

ARGUED MAY 22, 1919.

DECIDED JUNE 23, 1919.

COKE, C. J., KEMP AND EDINGS, JJ.

SPECIFIC PERFORMANCE—*contract for sale of chattels.*

Equity will not in general decree the specific performance of contracts concerning chattels because their money value recovered as damages will enable the party to purchase others in the market of like kind and quality.

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**SAME—same.**

But where the chattels are such that they are not obtainable in the market or can only be obtained at great expense and inconvenience and failure to obtain them causes a loss which cannot be adequately compensated in an action at law a court of equity will decree specific performance.

**CONTRACTS—damages for loss of profits.**

It is a rule that while under some circumstances a party has a right to recover loss of profits as a part of the damages for a breach of contract it is only where the profits are such as would have accrued and grown out of the contract itself as the direct and immediate result of its fulfillment.

**SAME—same.**

But if the profits are such as would have been realized by the party from other independent and collateral undertakings, although entered into in consequence and on the faith of the principal contract, they are too uncertain, remote and speculative to be taken into consideration as a part of the damages occasioned by the breach of the contract.

**SAME—measure of damages—resale.**

Where a vendor fails to comply with his contract the general rule for the measure of damages is the difference between the contract price and the market price of the commodity at the time of the breach, but if the contract of purchase is made with a view of a known resale already contracted or any known special use the damages which are contemplated to result from the vendor's breach are those which would naturally result on the basis of the contract for resale or other special use known to the vendor when the contract was made.

**SAME—same—same.**

The contemplation of damages will include such as ordinarily arise according to the intrinsic nature of the contract and the surrounding facts and circumstances made known to the parties at the time the contract was entered into.

**SAME—same—same.**

If the vendor has notice that his vendee has contracted to resell the article he will be held liable for loss of profits of such resale if he fails to fulfill his contract.

**SAME—same—same.**

But where long after the contract was entered into the vendee contracted to resell the article he could not recover as damages his contemplated profits; his damages would be limited to the difference between the contract price with the vendor and the

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market price of the commodity at the time of the breach of the contract.

*SAME—construction.*

The cardinal rule in the interpretation of contracts is to ascertain the intention of the parties and to give effect to that intention if it can be done consistently with legal principles and this intention will be gathered not from particular words and phrases but from the whole context of the agreement.

*SAME—reasonableness of construction.*

The rule of reasonableness of construction is that where the language of the contract is contradictory, obscure or ambiguous, or where its meaning is doubtful so that it is susceptible of two constructions, one of which makes it fair, customary and such as prudent men would naturally execute, while the other makes it inequitable, unusual and such as reasonable men would not be likely to enter into, the interpretation which makes it a rational and probable agreement must be preferred.

OPINION OF THE COURT BY COKE, C. J.

The complainant-appellee, the Hawaiian Pineapple Company, Limited, instituted a suit in equity against Masamari Saito and Libby, McNeill & Libby of Honolulu, Limited, respondents-appellants, for an injunction to restrain Masamari Saito from selling, and Libby, McNeill & Libby from buying, merchantable smooth cayenne pineapples grown and owned by Saito at Leilehua, Island of Oahu. An order to show cause was issued and at the hearing thereon a temporary injunction was issued against the respondents as prayed for. Upon the trial of the suit the writ of injunction was made perpetual. The respondents have prosecuted an appeal to this court. On March 8, 1916, the respondent Saito held under lease certain lots of land at Leilehua aforesaid upon which he was growing pineapples and upon that date he entered into a written contract with the complainant, the Hawaiian Pineapple Company, Limited, for the sale of his pineapple crop, which contract was to be and remain in force from May

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1, 1916, to April 30, 1920. The provisions of the contract which are pertinent to the matters under consideration are as follows:

"The Pineapple Company agrees that during the term of four years beginning May 1, 1916, and ending April 30, 1920, it will handle and buy under the conditions as hereinafter detailed, and with such exceptions as are hereinafter stated, all the merchantable smooth Cayenne pineapples that may be grown by the planter on his present holdings at Leilehua, or elsewhere on the Island of Oahu.

"The planter agrees that he will deliver to the Pineapple Company under the terms and conditions and with the exceptions hereinafter contained, all the merchantable smooth Cayenne pineapples that he may grow at Leilehua, or elsewhere on the Island of Oahu, or that he may own or control on the Island of Oahu, during the term stated.

\* \* \* \*

"It is mutually agreed that the pineapple Company will furnish f.o.b. railroad cars at Leilehua, Oahu, lug boxes for the delivery of the fruit, and that the planter will deliver said fruit f.o.b. railroad cars at Leilehua, Oahu, in said lug boxes, and that said merchantable pineapples will be delivered in such condition of ripeness as may from time to time be required or designated by the said Pineapple Company."

Subsequently to the execution of said contract, to wit, on the first day of July, 1916, and on the first day of August, 1916, respondent Saito acquired other leaseholds in and about Leilehua upon which he also grew and produced pineapples. All of the pineapples produced by Saito, both upon his prior and subsequently acquired holdings, were sold and delivered to the Hawaiian Pineapple Company up to and including the month of January 1918. At about the end of January 1918 Saito ceased to deliver to the Hawaiian Pineapple Company pineapples grown upon the leaseholds acquired by him subsequently to the execution of the contract of sale and on about the first day of April,



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1918, entered into a contract by which he agreed to sell and deliver to the respondent Libby, McNeill & Libby all pineapples grown and produced by him on the said after-acquired leaseholds.

The appeal of the respondents presents a variety of questions but for the purpose of this opinion we consider it necessary to discuss only the two main features of the controversy. The first goes to the jurisdiction of the court and has its basis in the contention of the respondents that the cause is not cognizable by a court of equity because the complainant has a complete and adequate remedy at law by way of damages, and the second questions the correctness of the construction or interpretation of the contract by complainant and adopted by the court below, it being the contention of the respondents that by the terms of the contract the respondent Saito was only obligated to sell and deliver to the complainant pineapples produced from lands which he owned or controlled on the Island of Oahu at the date of the contract and regarding these pineapples there is no present controversy.

Irrespective of what may be the proper interpretation and effect of the contract we shall proceed first to determine the question of jurisdiction. We will therefore assume for the present, without so deciding, that the respondent Saito was bound under his contract with the complainant to sell and deliver to it the pineapples grown and produced by him upon the premises which he acquired after the date of the contract.

The complainant Hawaiian Pineapple Company owned and operated a large pineapple cannery at Honolulu, some twenty miles from Leilehua; its estimated pack for the year 1918 was 904,671 cases; on or about March 18, 1918, it received and booked orders and agreed to sell its 1918 pack to various customers throughout the United States and elsewhere at a definite and fixed price. In fact it

## Opinion of the Court.

had agreed to sell more cases of pineapples than it expected to produce but there was an understanding with its customers that in case of a shortage deliveries would be prorated. It appears that the controversy involved about 600 tons of pineapples for the year 1918, and the failure of the respondent Saito to deliver to the Hawaiian Pineapple Company these pineapples resulted in decreasing the pack of the company for that year approximately 20,000 cases. The evidence shows that practically all of the pineapples grown and produced in 1918 on the Island of Oahu were contracted for and that it was impossible for the company by purchase or otherwise to secure other pineapples in lieu of those which it claimed to be entitled to receive from Saito. It will thus be seen that an entirely different state of facts exists to those present in the case of *Lum Wai v. Hong Hoon*, ante p. 696, recently decided by this court. In that case specific performance of a contract for the sale of taro was sought but it was not shown that other taro could not be purchased in the open market, and for that reason it was held that a court of equity was without jurisdiction. The principle was there enunciated that "Equity will not in general decree the specific performance of contracts concerning chattels because their money value recovered as damages will enable the party to purchase others in the market of like kind and quality." But in the *Lum Wai* case it was further held that where the chattels are such that they are not obtainable in the market or can only be obtained at great expense and inconvenience and failure to obtain them causes a loss which could not be adequately compensated in an action at law a court of equity will decree specific performance. The respondents do not question the soundness of this doctrine but they urge that because the complainant had already sold his 1918 pack of pineapples, thereby placing a fixed valuation upon the commodity, that by an action of

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damages in a court of law it could have adequate compensation for the breach of the contract and that the measure of damages would be complainant's loss of profits ascertained by computing the difference between the price it was to pay Saito for the pineapples under the contract and the price for which it had resold the canned product less the cost of canning and marketing. It might be possible, although perhaps more or less difficult, to establish with sufficient certainty the cost and expense which would be necessarily incurred in converting 600 tons of raw pineapples into the finished canned product and placing the same on the market. Risks of various kinds, depreciation, uncertainty of labor and many other uncertain elements might intervene which would entirely upset a careful estimation of cost. But conceding that the correct figures might be arrived at, could the complainant under the circumstances of this case hold the respondent Saito in damages for its loss of profits? The rule in this respect is that while under some circumstances a party has a right to recover loss of profits as a part of the damages for a breach of the contract it is only where the profits are such as would have accrued and grown out of the contract itself as the direct and immediate result of its fulfillment, but if they are such as would have been realized by the party from other independent and collateral undertakings, although entered into in consequence and on the faith of the principal contract, they are too uncertain, remote and speculative to be taken into consideration as a part of the damages occasioned by the breach of the contract. In the much canvassed case of *Hadley v. Baxendale*, 9 Exch. 341, Anderson, B., in pronouncing the judgment of the court enumerated certain principles on which damages should be awarded for breaches of contract. The rule there adopted as resting on the foundation of correct legal principles was that the damages recoverable for a breach

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of contract were either such as might be considered as arising naturally, i. e., according to the usual course of things from the breach of the contract itself, or such as might reasonably be supposed to have been in the contemplation of both parties at the time they made the contract. The case of *Masterton v. Mayor*, 7 Hill 61, we believe is looked upon as a leading American authority upon the subject. Where a vendor fails to comply with his contract the general rule for the measure of damages is the difference between the contract price and the market price at the time of the breach, but if the contract of purchase is made with a view of a known resale already contracted or any known special use the damages which are contemplated to result from the vendor's breach are those which would naturally result on the basis of the contract for resale or other special use known to the vendor when the contract was made. The contemplation of damages will include such as ordinarily arise according to the intrinsic nature of the contract and the surrounding facts and circumstances made known to the parties at the time the contract was entered into. If the vendor has notice that his vendee has contracted to resell the article he will be held liable for loss of profits of such resale if he fails to fulfill his contract, though perhaps he was not informed of the price at which the commodity was to be resold. See 1 Sutherland on Damages, 80-84. In *Messmore v. The N. Y. S. & L. Co.*, 40 N. Y. 422, the plaintiff contracted to sell to the State of Ohio a large quantity of bullets of a certain quality at a fixed price to be delivered at Columbus, Ohio, and made a contract with defendant by which the latter agreed to manufacture and deliver him the same quality and quantity of bullets and at the time of making the contract the plaintiff informed defendant of his agreement with the State of Ohio and that he was contracting with defendant for the bullets

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in order to fill the engagement, and it was held that the proper measure of damages was the difference between the contract price at which defendant was to furnish the bullets and the price the plaintiff was to receive. And again, in *Marthinson v. King*, 150 Fed. 48, where for a valuable consideration the plaintiff procured an option from the defendant for certain growing timber and a logging camp outfit and upon the same day contracted to sell the property to a third party at an advanced price, the defendant having knowledge of the latter contract, and the court finding that both contracts really constituted the same transaction it was held that equity was without jurisdiction to decree specific performance because the plaintiff had an adequate remedy at law in an action for damages, the measure of such damages being the difference between the price plaintiff was to pay defendant for the property and the price which he was to receive therefor under his contract of resale.

In the present case it may be assumed that the respondent Saito knew that the plaintiff entered into the contract for the purpose of obtaining a supply of raw material for the operation of its pineapple cannery but we do not think it can be assumed that Saito had in contemplation that some years later the complainant would resell the article at a profit. There was no stipulation in the contract that the complainant should make profits on the pineapples after the same had been prepared, canned and placed upon the market. Nor were there any special circumstances attending the transaction from which an understanding between the parties could be inferred that the respondent Saito was to make good any loss of profits incurred by reason of a breach of contract upon his part. *Howard v. Stillwell & Bierce Mfg. Co.*, 139 U. S. 199, 210. See also *Western Union Tel. Co. v. Hall*, 124 U. S. 444. Had the complainant in this case proceeded at law against the

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defendant for breach of contract its measure of damages would have been limited to the difference between the contract and the market price of the pineapples at the time of the breach of the contract, for we are clearly of the opinion that, although perhaps there was very little if any of the article to be obtained in the market at the time of the alleged breach, pineapples in the Territory at all times possess a market value which may easily be established in a court of law. Under these circumstances, assuming that the complainant had gone to a court of law for redress, could it have obtained adequate relief? We think not. Complainant contracted to purchase the pineapples for the proper and economical operation of its cannery. The failure of Saito to deliver the pines caused a decrease in the 1918 pack estimated at between 15,000 and 22,000 cases. In view of the fact that other pineapples were not obtainable by the complainant in lieu of those involved in this suit complainant was bound to have sustained a loss which could not have been adequately measured in damages in a court of law under the rules herein laid down. Cans and other equipment, labor, etc., were required to be provided in advance to take care of the contemplated operation of the cannery based upon the estimated tonnage of pineapples to be received at the cannery and for this reason the principles announced in the case of *Curtice Bros. Co. v. Catts*, 66 Atl. 935, apply. In that case it was held that where the defendants contracted to sell to the plaintiff the entire product of certain lands planted in tomatoes which plaintiff required for the operation of the cannery to the full capacity thereof that specific performance of the contract by defendants would be decreed upon their refusal to fulfill the terms of the contract. The same doctrine was adopted in *Texas Co. v. Central Fuel Oil Co.*, 194 Fed. 1, 13; also in *Equitable Gas Light Co. v. Baltimore Coal Tar & Mfg. Co.*, 63 Md.

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285; and also in *Gloucester Isinglass & Glue Co. v. Russia Cement Co.*, 154 Mass., 92, and these authorities received the sanction of this court in *Lum Wai v. Hong Hoon*, *supra*.

We are therefore of the opinion that equity had jurisdiction of the cause and that a court of equity alone could afford complainant adequate relief, provided of course an interpretation of the contract justifies the conclusion that there was a breach thereof.

We will now take up the consideration of the contract in order to construe it as nearly as may be according to the intention of the parties as expressed therein and from such extrinsic facts and circumstances as may properly be taken into consideration.

The paragraphs of the contract requiring construction are contained in the forepart of this opinion. The cardinal rule in the interpretation of contracts is to ascertain the intention of the parties and to give effect to that intention if it can be done consistently with legal principles and this intention will be gathered not from particular words and phrases but from the whole context of the agreement. The contract must be considered from beginning to end and all its terms must pass in review for one clause may modify, limit or illuminate the other.

In the first paragraph of the contract quoted above the company agreed during the term of four years to buy all the merchantable smooth cayenne pineapples that might be grown by the planter on his "*present holdings*" at Leilehua or elsewhere on the Island of Oahu or that he might own or control on the Island of Oahu. We think from this phraseology there is no room to doubt that the company was obligated to buy only the pineapples grown by Saito on his then holdings at Leilehua or elsewhere on the Island of Oahu. In the following paragraph the planter agreed to deliver to the company all merchantable



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smooth cayenne pineapples which he might grow at Leilehua or elsewhere on the Island of Oahu or which he might own or control on the Island of Oahu during the term stated. If this latter paragraph could properly be interpreted without reference to the other clauses in the contract it might be reasonable to assume that Saito obligated himself to deliver pineapples grown on his then holdings or upon any land subsequently acquired at Leilehua or elsewhere on the Island of Oahu, but this interpretation would necessarily mean that Saito had contracted to sell to the company pineapples which the company was under no obligation to purchase. We are convinced that such was not the intention of the parties at the time the contract was entered into. Their clear intention we think was to enter into a contract with reciprocal obligations on both sides, that is to say, the company was obligated to buy and the planter was obligated to sell all the pineapples grown by the planter upon his holdings which he possessed at Leilehua or elsewhere on the Island of Oahu at the date of the making of the contract, the location and extent of which were known to the parties at the time and the area of which was noted in writing upon the contract at the time of its delivery to the company by one of its representatives as containing 150 acres. The correctness of this intention is made patent when the further clause in the contract which requires the planter to deliver all of said fruit f.o.b. railroad cars at Leilehua, Oahu, is considered. Assume that subsequently to the date of the contract Saito acquired land at Waimanalo or at some other locality remote from and inaccessible to Leilehua and that upon this land he grew and produced pineapples. In that event if the construction urged by complainant is to be adopted Saito would be required to deliver these pineapples to the company f.o.b. cars at Leilehua at \$14 per ton, when, from the geographical and physical conditions prevailing, which



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are within the common knowledge of all, the expense of transportation alone would far exceed that amount. In this connection the rule of reasonableness of construction will apply the effect of which is that where the language of the contract is contradictory, obscure or ambiguous, or where its meaning is doubtful so that it is susceptible of two constructions, one of which makes it fair, customary and such as prudent men would naturally execute, while the other makes it inequitable, unusual or such as reasonable men would not be likely to enter into, the interpretation which makes it a rational and probable agreement must be preferred. See *Leschen & Sons Rope Co. v. Mayflower Gold Mining, etc., Co.*, 173 Fed. 855.

The contract before us is by no means without obscure, ambiguous and contradictory language, the meaning of which is susceptible of more than one construction. The construction thereof by the complainant, which has the adoption and approval of the court below, would make of it an unusual, unfair and improbable contract.

Complainant lays stress upon what it claims was the contemporaneous and mutual construction of the contract by the parties because Saito up to the end of January, 1918, sold and delivered to the company all of the pineapples which he had produced on all of his holdings at Leilehua, acquired both prior and subsequently to the date of the contract. Little weight can be attached to this circumstance when the facts are considered. It appears that on August 10, 1916, Saito borrowed from the company the sum of \$6000 and executed a chattel mortgage covering all of the pineapples raised and produced or to be raised and produced by him upon virtually all of his holdings at Leilehua at that time and for the purpose of liquidating the mortgage indebtedness all of his pineapples were delivered to the company until the mortgage was finally paid in full on or about the tenth day of Septem-

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ber, 1917; that between that date and the first of February, 1918, Saito sold and delivered to the company the remnants of his 1917 crop which amounted to only a small tonnage. Shortly following that date Saito, being out of debt to the company and no longer obligated to it except under his contract, entered into a contract with the respondent Libby, McNeill & Libby for the sale of the pineapples grown by him upon the premises acquired by him subsequently to the date of the contract with the company. Bearing these circumstances in mind and also in light of the fact that Saito is not conversant with the English language and that his negotiations and dealings with the company were carried on through the medium of a Japanese interpreter we are unable to give much force to the contention that there was a mutual interpretation of the contract in accordance with the present construction placed thereon by the complainant.

We are therefore of the opinion and hold that by the terms of the contract Saito is under no obligation to sell to the complainant pineapples produced from lands which were acquired after the contract was entered into.

The decree appealed from should be vacated and set aside, the injunction dissolved and complainant's bill herein dismissed, and the cause is therefore remanded to the court below for proceedings consistent with this opinion.

*U. E. Wild and E. C. Peters (Frear, Prosser, Anderson & Marx and Peters & Smith on the brief) for complainant.*

*J. W. Cathcart and B. S. Ulrich (Thompson & Cathcart on the brief) for respondents.*

WHEREAS, William Cooper Parke, a member of the Bar of this Court, who was admitted to practice on the 17th day of September, 1889, died at Honolulu on the 17th day of November, 1917;

RESOLVED, That the members of this Bar record their sorrow and regret at the loss of their friend and brother, and express their regard for his memory;

RESOLVED, Further, that the Supreme Court be requested to spread this Resolution upon its minutes, and that a copy be sent to the family of the deceased.

Honolulu, March 18, 1918.

## RULES OF THE SUPREME COURT.

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### RULE 8. APPEAL, ERROR AND EXCEPTIONS FROM CIRCUIT COURTS AND CIRCUIT JUDGES.

(As Amended May 13, 1918.)

1. On appeal, error or exceptions from a circuit court or circuit judge, no original papers other than bills of exceptions, transcripts of evidence and exhibits, shall be transmitted to this court unless by order of the court or a justice thereof. Original transcripts and exhibits may be returned to the circuit court or judge upon the determination of the case in this court unless otherwise ordered. Copies of papers shall be printed or typewritten and certified.

2. Bills of exceptions shall contain only such papers and statements as are necessary for the disposition of the questions of law raised by the exceptions. No papers shall be made a part thereof by reference unless specifically named.

3. In every case in which a proposed bill of exceptions shall be disallowed by a circuit judge and the establishment of the bill in this court shall be desired by the appellant, the record shall be composed of the same original papers and certified copies of papers and shall be transmitted to this court within the same time as though the bill of exceptions had been allowed by the circuit judge. The appellant shall, within ten days after the filing of the necessary papers aforesaid in this court, file a motion, supported by affidavit to the effect that all of the allegations of the bill are true and that the circuit judge refused to allow and sign the bill, asking that he may be allowed to establish the truth of the bill and that a time be set for a hearing on the motion. If the truth of the bill shall be established the bill shall be allowed. Failure to comply with any requirement of this rule shall subject the pro-

posed bill of exceptions to removal from the files of this court.

4. In order to obtain a review in this court of an interlocutory ruling or order in a term case the exception thereto must be presented to the circuit judge for allowance and certification to this court within ten days from the making of the ruling or order sought to be reviewed, and within five days after the exception is certified to this court for review the party taking the exception must pay the necessary costs, and file the necessary bond or make cash deposit in lieu thereof. The ruling or order sought to be reviewed and all parts of the record in the case necessary to a determination of the questions raised must be made a part of the exception, either by reference, or by embodying the same therein.

5. After final judgment a party seeking a review in this court by exceptions must within a reasonable time not exceeding twenty days after the allowance of his bill of exceptions pay the necessary costs and file the necessary bond or deposit cash in lieu thereof.

6. When a circuit judge certifies an interlocutory exception to this court, or allows and signs a bill of exceptions after final judgment he must immediately cause notice thereof to be given to counsel for the respective parties, or to parties who have not appeared by counsel, unless counsel or the parties are present at the time of the allowance and certifying the interlocutory exception to this court, or the allowance and signing of the bill of exceptions after final judgment, as the case may be.



# DIGEST

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## ABANDONMENT.

### 1. *Waterrights—non-user—proof.*

Non-user of a right to take water from a stream is not shown by proof that branch ditches have been filled up or disused, where it appears that the intakes and main ditches leading from the stream have been maintained, and it does not appear that water has not been diverted as it has been available under a diminished supply. *Carter v. Territory*, 47, 57.

## ABATEMENT AND REVIVAL.

### 1. *Set-off and counterclaim.*

Where the defendant is sued in assumpsit and in his answer pleads by way of set-off and counterclaim a cause of action in assumpsit against the plaintiff, and thereafter, as plaintiff, sues the plaintiff in prior action as defendant upon the identical cause of action pleaded by way of set-off and counterclaim in the former action, the defendant's plea in abatement in the last action pleading the pendency of the former action and the set-off and the counterclaim therein should be sustained and the last action abated. *Paxson v. Schuman Car. Co.*, 393.

## ACCOUNT.

### 1. *Jurisdiction of equity.*

Section 2473 R. L. 1915 confers upon circuit judges jurisdiction in equity in suits upon accounts when the nature of the accounts is such that it cannot be conveniently and properly adjusted and settled in an action at law. *Colburn v. Kapiolani Est.*, 706, 707.

### 2. *Complicated account.*

Where the accounts are so complicated as to embarrass the remedy at law this constitutes of itself sufficient ground for the assumption of jurisdiction by a court of equity although the accounts are not mutual and no fiduciary relation exists between the parties. *Colburn v. Kapiolani Est.*, 706, 709.

See also EQUITY, 8; TENANCY IN COMMON, 3, 6.

## ACCOUNT, OPEN.

See PAYMENT, 1.

## ACTION.

### 1. *Damages—trespass—judgment.*

Where plaintiff elects to maintain his action against the defendants jointly any judgment recovered against them is joint and several. *Kealoha v. Halawa Plant.*, 436, 439.

## ACTION—Continued.

2. *Damages—trespass—judgment.*

An action sounding in damages against joint trespassers is in its nature a joint and several action. The plaintiff may proceed against the defendants jointly or separately for the entire damage but can have but one satisfaction of judgment. *Kealoha v. Halawa Plant.*, 436, 438.

See also HUSBAND AND WIFE, 4; TENANCY IN COMMON. 7.

## ADOPTION.

1. *Minors—adults.*

Under a statute providing for the adoption of children, the word "minor" or other words showing an intent to limit adoption to minors not being used, an adult may be adopted by another and the adoption creates in law the relation of parent and child. *Souza v. Lusitana Society*, 396, 400. (*Overruled*, 643.)

2. *Of adults.*

The adoptions of adults is not authorized by statute in this Territory. *Souza v. Sao Martinho Society*, 643.

## ADVERSE POSSESSION.

1. *Effect of.*

By adverse possession of land for the statutory period of limitation the adverse holder acquires a title in fee simple which is as perfect as a title by deed. Its legal effect is not only to bar the remedy of the owner of the paper title but to divest his estate and vest it in the party holding adversely for the required period of time. *Waianae Company v. Kaiwilei*, 1, 7.

2. *Continuity of.*

Where the statute of limitations had commenced to run in favor of defendant the subsequent delivery of a deed of the property by the holder of the paper title thereto to two minor children of defendant who were then living with defendant upon the property would not destroy the continuity of defendant's possession nor have the effect of tolling the bar of the statute. *Waianae Co. v. Kaiwilei*, 1, 8.

3. *Character of possession.*

Where the defense of adverse possession is interposed the character of the possession is a question for the jury. *Waianae Co. v. Kaiwilei*, 1, 8.

4. *Against infants.*

An adverse possession which began during the life of the ancestor or grantor will continue as against the infant heirs or grantees. *Waianae Co. v. Kaiwilei*, 1, 6.

5. *Presumptions regarding.*

A possession adversely commenced is presumed to continue adversely so long as maintained. *Waianae Co. v. Kaiwilei*, 1, 6.



## ADVERSE POSSESSION—Continued.

6. *Claim of title.*

While it is true that the possession must be under claim of title it is not essential that there should be a rightful title. An invalid and defective title, if believed to be good, should be equally as operative as a valid one in giving effect to a possession taken and held under it. *Waianae Co. v. Kaiwilei*, 1, 7.

7. *Interests of infants.*

If the ancestor or grantor of two minor children was living at the time the statute of limitations had commenced to run in favor of a third person the disabilities through non-age of his grantees could not check or impede the running of the statute. *Waianae Co. v. Kaiwilei*, 1, 6.

8. *Presumption of deed.*

Where the possession has been open, exclusive and uninterrupted for the period prescribed by the statute of limitations to bar an action for the recovery of land there is a legal presumption of a deed. *Do Rego v. Oyagi*, 750.

See also TENANCY IN COMMON, 4. 5.

## ALIENS.

See CITIZENS, 1, 2.

## ANNUITY.

See WILLS, 6, 7, 10.

## APPEAL AND ERROR.

1. *Reserved question—points decided.*

A decision of the supreme court upon questions reserved by a circuit court which present but one of several points which have been raised by a demurrer to a complaint, the point being overruled, is not a decision that the complaint states a complete cause of action. *Lewers & Cooke v. Wong Wong*, 39.

2. *Appeals from Circuit Courts.*

An appeal does not lie from the judgment of a circuit court. *In re Goo Wan Hoy*, 71.

3. *Mandamus—plaintiff in error in contempt of court.*

In this Territory the judgment of a circuit judge in a mandamus case may be reviewed by the supreme court either upon an appeal or a writ of error. The right of the respondent to a writ of error is not lost because of the fact that he may be in contempt of court for not having obeyed the mandate of a peremptory writ. *Brown v. Kinney*, 124, 126.

4. *Mandamus—satisfaction of judgment.*

Under the statute relating to writs of error, the judgment in a mandamus case is not regarded as fully satisfied where a peremptory writ, though served, has not been complied with. *Brown v. Kinney*, 124.

## APPEAL AND ERROR—Continued.

5. *General exception.*

A general exception to the entire charge of the court given to the jury does not bring to the attention of this court any specific question of law presented to the lower court and is too general to be considered in the appellate court. *Territory v. Alcantara*, 197, 198.

6. *Exceptions—specific questions.*

The purpose of an exception is to bring to the appellate court a specific question of law upon which the trial court has erroneously ruled to the prejudice of the party excepting. *Yim Fat v. Gleason*, 210, 211.

7. *Rejected evidence—record.*

The appellate court will not consider an exception to the action of the trial court in sustaining an objection to a question asked a witness when the record does not disclose any offer to show what the answer will be and that the answer would be material and competent evidence. *Yim Fat v. Gleason*, 210, 212.

8. *Right of appeal.*

A party to a suit cannot appeal from a decree therein rendered if he is not thereby affected. *Haw. Trust Co. v. Holt*, 212.

9. *Appeal must be from final order.*

In an appeal on points of law from a decision of a district magistrate the "decision" appealed from must be final. *Peabody v. Paakaua*, 250, 253.

10. *Order sustaining motion to quash summons not appealable.*

An order of a district magistrate sustaining a motion to quash a summons is not a final order, and therefore is not appealable. *Peabody v. Paakaua*, 250, 255.

11. *Findings—evidence.*

When the evidence is meagre and unsatisfactory but tends to support the findings of fact made by the trial judge sitting in equity the findings will be sustained on appeal. *Scott v. Pilipo*, 277, 282.

12. *Interlocutory exceptions.*

Where a party before final judgment seeks to have an interlocutory order in a term case reviewed in the supreme court he must reduce his exception to writing and present it to the trial judge for allowance and certification to the supreme court within ten days of the making of the interlocutory order sought to be reviewed under circumstances like those disclosed by the record in this case. *Bell v. Engels Copper Min. Co.*, 318.

13. *Record on appeal.*

We are bound by the facts found by the trial court and cannot presume the existence of any fact not shown in the findings as the evidence is not before us, for which reason that part of the exception to the decision that it is contrary to the evidence cannot be considered. *Kaahanui v. Kaohi*, 361, 363.

## APPEAL AND ERROR—Continued.

14. *Reserved questions.*

Questions were reserved to this court touching the merits of a bill in equity raised by demurrer which the court answered, advised that the demurrer be sustained and in the opinion made suggestions whereby the bill could be amended so as to entitle plaintiff to relief in equity; the plaintiff amended her bill in court below to which amended bill the defendants demurred and the circuit judge has reserved the questions to this court touching the merits of the amended bill and which could be determined from the rules enunciated in the former opinion of this court: Held that this court will, on its own motion and in the exercise of its discretionary power, return the questions unanswered. *Makainai v. Lalakea*, 364.

15. *Directed verdict.*

A judgment on writ of error is affirmed where the jury were instructed to find for the defendant, an examination of the record shows that a fact material to plaintiff's recovery was not alleged or proven, and nothing in the record shows that the error was cured. *Fernandez v. Lusitana Soc.*, 421.

16. *Record on appeal.*

Where unnecessary documents are included in the record, the appellant, should he prevail in this court, will not be permitted to recover from the appellee costs for the preparation of that portion of the record which is found to be unnecessarily made a part thereof. *Parson v. Schuman Car. Co.*, 426.

17. *Reserved questions unanswered.*

Where the plaintiff sues forty-seven defendants, a number of appearances being made by various counsel for some of the defendants, one of the defendants answering the bill of complaint which was for accounting, discovery and enforcement of stockholders' liability in a corporation, numerous demurrers being filed upon behalf of the other defendants wherein numerous grounds of demurrer are alleged, each of the demurrers being different from the other and whereby a large number of questions are raised, the circuit judge at the hearing of the demurrers and before the argument was completed reserved the questions as to whether or not the demurrers should be sustained, and if not all of them, which of the demurrers should be sustained and which should be overruled, such reserved questions do not present concrete questions of law contemplated by the statute and this court will return the same unanswered. *Sherman v. McClellan*, 428.

18. *Reserved questions—record.*

This court will return unanswered for decision by the circuit judge in the first instance reserved questions based upon a

## APPEAL AND ERROR—Continued.

lengthy original record in the circuit court and this court will answer no reserved questions except upon a record made for and to remain in this court. *Sherman v. McClellan*, 428.

19. *Adverse parties—notice of appeal.*

A party to a cause is adverse to the appellant and must be served with notice of appeal, whose interest would be detrimentally affected if any of the relief sought by the appeal should be granted. *Kealoha v. Halawa Plant.*, 436, 439.

20. *Nature of writ of error.*

exception to the decision that it is contrary to the evidence cannot be considered. *Kaahanui v. Kaohi*, 361, 363.

A writ of error is in the nature of a new proceeding commenced by petition and upon which a citation issues. A bill of exceptions possesses neither of these features. *Kealoha v. Halawa Plant.*, 436, 438.

21. *Notice of appeal—service on adverse party.*

The general rule respecting appeals is that co-parties to an action who do not join in the appeal must be served with notice of appeal when their interests are adverse to those of the party prosecuting the appeal. *Kealoha v. Halawa Plant.*, 436, 439.

22. *Power of supreme court.*

When causes are appealed or brought here on error, we have before us the entire record and may review, reverse, affirm, amend, modify or remand for new hearing in chambers such decision, judgment or decree in whole or in part and as to all or any of the parties. *Chinese Society v. Yee Yap*, 473, 475.

23. *Modifications of decree.*

Where an appellate court merely modifies a decree of an inferior court in respect to a certain portion thereof that portion of the decree which is not modified is affirmed. *Chinese Society v. Yee Yap*, 473, 475.

24. *General objections.*

It is a familiar rule that mere general objections, without the statement of any specific ground of objection, will not be reviewed in the appellate court or constitute ground for a new trial. *Ter. v. Kekipi*, 500, 506.

25. *Land court.*

Exceptions do not lie to this court from the refusal of the judge of the land court to frame issues of fact for submission to a jury. *In re Atcherley*, 507.

26. *Stay—contempt.*

The circuit judge is without jurisdiction to enforce an order for separate maintenance by contempt proceedings when an appeal has been taken and pending such an appeal a writ of prohibition will lie to prevent its enforcement by contempt proceedings. *Reynolds v. Reynolds*, 510.

## APPEAL AND ERROR—Continued.

27. *Must be from decree.*

The filing of a written decision sustaining a demurrer to a bill of complaint in an equity case is not a final decision within the meaning of the law of appeals and an appeal does not lie therefrom. The appeal must be taken from the decree and not from the decision. *Makainai v. Lalakea*, 518, 521.

28. *Time of filing notice of appeal.*

R. L. Sec. 2508 provides that notice of appeal shall be filed within five days after the filing of the decision, judgment, order or decree appealed from. A notice of appeal not filed within the statutory time is invalid and upon motion will be dismissed. *Makainai v. Lalakea*, 518, 524.

29. *Filing of appeal—time of.*

A notice of appeal from a decision in an equity case filed before the entry of the decree will not be ordered by this court filed as of the day of the entry of the decree. *Makainai v. Lalakea*, 518, 522.

30. *Modification of judgment.*

We see no reason why the verdict in this case should not stand and the further proceedings be confined to a judicial ascertainment by the court of the earning capacity, income, etc., of the defendant and a modification of the judgment in accordance with the facts thus ascertained by the court. *In re Ah Sam*, 591, 597.

31. *Verdict based on evidence.*

This court will not on error reverse a verdict where the record shows that it was based on the credibility of witnesses or the weight of the evidence. *Akatsuka v. McKay*, 600, 604.

32. *Joinder of parties.*

Where a judgment or decree is several and the interests represented by each of the co-parties are separate and distinct from and not adverse to those of the others any party may sue out a writ of error to protect his own interests without joining his co-parties. *County of Maui v. do Rego*, 608, 610.

33. *Time—nunc pro tunc order.*

Notwithstanding an order is made *nunc pro tunc* the time within which a bill of exceptions may be presented to the judge for allowance runs from the date the order was actually made. *Holiona v. Kamai*, 638, 641.

34. *Rule where both error and exceptions are attempted.*

Where a writ of error which sought a review of certain rulings was dismissed in this court without being considered on its merits a review of the same rulings may be had by exceptions subsequently perfected. *Holiona v. Kamai*, 638, 640.

35. *Defective bond.*

Where a bond on writ of error was signed by an attorney in fact

## APPEAL AND ERROR—Continued.

a motion to quash on the ground that the bond was defective was denied and it was held that the failure of the attorney in fact to present with the bond his authority, even if it amounted to an irregularity or informality, would not justify quashing the writ. *Tomishima v. Hurley*, 662.

36. *Record on.*

This court will not consider an appeal where the record transmitted to it is so incomplete as to render its judgment thereon conjectural. *Estate of Holt*, 663.

37. *Time of filing.*

An appeal filed prior to the filing of the decree appealed from is premature although an oral order of like purport had been made prior thereto. *Holiona v. Kamai*, 638, 640; *Do Rego v. Oyagi*, 664, 666.

38. *Exceptions—judgment.*

Exceptions to a judgment would be effective only to present any question properly raised as to its form but could not serve to bring up the merits of the decision. *Do Rego v. Oyagi*, 664.

39. *Exceptions—judgment.*

A judgment is not an essential part of the record on exceptions and it is immaterial whether a judgment has or has not been entered in the lower court. *Do Rego v. Oyagi*, 664.

40. *Effect of decision of court.*

A decision of a circuit court, jury waived, is equivalent to a verdict of a jury and will not be disturbed if supported by evidence. *Whitford v. Kahananui*, 667, 671.

41. *Time for appeal.*

The steps required by statute for taking an appeal must be taken within the prescribed time or the appeal will be ineffective. *Correa v. Felipe*, 672, 674.

42. *Land court—time.*

In an appeal from a decree of a land court to the circuit court for a jury trial issues must be framed in the land court within thirty days after the date of the decree or within such further time as the court shall allow, and where no further time has been allowed and issues are framed after the expiration of thirty days from the date of the decree the appellate court does not acquire jurisdiction of the cause and the appeal will be dismissed upon motion. *Correa v. Felipe*, 672.

43. *Error to circuit court of appeals—amount in dispute—burden of proof.*

A writ of error from a final judgment of the supreme court may be had and prosecuted in the United States circuit court of appeals where the amount involved, exclusive of costs, exceeds \$5000.00. The burden of proof is on plaintiff in error, where

## APPEAL AND ERROR—Continued.

the record is silent as to the value of the subject matter in dispute, to establish that it is of jurisdictional value. *Kahaulelio v. Ihihi*, 685.

44. *Decisions reviewable.*

When a trial judge suffers improper or irrelevant and prejudicial evidence to be introduced and does not specifically and positively disregard and repudiate such evidence in his findings of fact, his decision or decree is reviewable as an error of law by this court. *Kamahalo v. Coelho*, 689, 691.

45. *Rules—record on appeal.*

It is the duty of the appellant to see that the records are transmitted to the appellate court within the time prescribed by the rules. This is a responsibility which the appellant cannot delegate to the clerk of the circuit court and then excuse noncompliance with the rules because the clerk failed to follow instructions. *Estate of Brown*, 711.

46. *Time to perfect appeal.*

An appellant should make it his business to bring the record to this court within twenty days after the appeal is perfected, or, if that period is too short, then to request of this court or a justice thereof additional time. In the present case his failure to do either is inexcusable. *Estate of Brown*, 711.

47. *Exceptions—burden of sustaining error.*

The burden of sustaining allegations of error is upon appellant and where for the proper determination of the merits of exceptions a transcript is necessary and none is supplied the exceptions will be overruled. *Ter. v. Kealoha*, 713, 715.

48. *Appeals under Workmen's Compensation Act.*

Where the employer or the insurance carrier appeals from an award made by the industrial accident board to the circuit court the statute contemplates the trial of the cause de novo in the appellate court before a jury, if a jury is demanded; otherwise before the court without the intervention of a jury. *Ching Hon Yet v. See Sang Co.*, 731, 736.

49. *Questions raised for first time on appeal.*

Where no request is made to the trial court for an opportunity to refute a claim on a matter of fact, the attempt to raise the point in the appellate court comes too late. *Ching Hon Yet v. See Sang Co.*, 731, 741.

50. *Costs necessary to be paid as a prerequisite to appeal.*

Items of expense incurred in the course of litigation not properly termed costs of court are not required to be paid as a prerequisite to the right of appeal. *Lufkin v. Grand Hotel Co.*, 744, 747.

## APPEAL AND ERROR—Continued.

51. *Adverse party defined.*

In determining whether or not one is an adverse party (and therefore entitled to notice of appeal) the supreme test is the possession of some substantial interest adverse to the interest of appellant in the order or decree appealed from. *Lufkin v. Grand Hotel Co., Ltd.*, 744.

52. *Effect of service of notice of appeal on attorneys not of record.*

Notice of appeal to attorneys not shown to be of record for a party in the particular proceeding involved is not notice to that party, although they may at the time be attorneys of record for the said party in a proceeding pending in another court. *Lufkin v. Grand Hotel Co., Ltd.*, 744.

53. *Service of assignments of error.*

Where a statute prescribes that service of process upon one of several joint makers of a promissory note shall be service upon all, the same method of service of the assignment of error is sufficient the same being constructive service upon all under the statute. *First Bank of Hilo v. Maguire*, 774.

See also CRIMINAL LAW, 4; EXCEPTIONS, BILLS OF, HUSBAND AND WIFE, 2, 3.

## APPEARANCE.

1. *Effect of as waiver.*

Where defendants appear generally they waive all objections to the summons and submit themselves to the jurisdiction of the court. *Wong Young v. Kun Ching*, 95.

## ARBITRATION.

1. *Finality of decision.*

Whenever a question of property is at stake, it is generally held, although there is authority to the contrary, that the decision of an arbitration board created by a beneficial society with power finally to determine controversies is not final and the party complaining may sue in a court of law. *Fernandez v. Lusitana Soc.*, 421, 424.

## ASSAULT AND BATTERY.

1. *Instructions.*

In an action for assault and battery it is not error to refuse requested instructions not applicable to such a case. *Leong Sam v. Kelihoomalulu*, 477.

2. *Liability of peace officer in making arrest.*

A peace officer is not liable for injuries inflicted by him in the use of reasonably necessary force to preserve the peace and maintain order or to overcome resistance to his authority; but is liable if unnecessary violence is used to accomplish the



## ASSAULT AND BATTERY—Continued.

purpose or if he assaults a person without just excuse. *Leong Sam v. Kelihoomalu*, 477, 482.

## ATTACHMENT.

See GARNISHMENT, 4.

## ATTORNEY AND CLIENT.

See APPEAL AND ERROR, 52; GARNISHMENT, 2, 3; TRUSTS, 6; WILLS, 9, 10.

## AUTOMOBILES.

See COUNTIES, 1; NEGLIGENCE, 2.

## BASTARDS.

1. *Presence of child in court.*

It is not error to permit the child whose paternity is the subject of inquiry to remain in the court room during the trial and to be held on the mother's lap while she is giving her evidence. *Re Ah Sam*, 591, 595.

2. *Judgment—financial standing of defendant.*

When no error is found in the proceedings before the jury, but the court fails to ascertain the financial standing, etc., of the defendant prior to the entry of judgment fixing the amount defendant shall pay for the support of an illegitimate child, the judgment in that respect will be reversed, but so much thereof as is based upon the verdict will not be disturbed. *Re Ah Sam*, 591, 596.

3. *Judgment—amount—how determined.*

The facts upon which the court determines the amount of the judgment to enter against one who has been found to be the father of a bastard child should be judicially ascertained and disclosed by the record. *Re Ah Sam*, 591, 596.

## BENEFICIAL ASSOCIATION.

1. *By-law—construction.*

Where a by-law of a beneficial association provides that on the death of a member in good standing a certain death benefit shall be paid to his relatives in a certain prescribed order, viz., 1. To the widow; 2. To the children, legitimate or legitimated, the adopted children of a member who dies in good standing leaving no widow are entitled to such death benefit. *Souza v. Lusitana Society*, 396.

See also ARBITRATION, 1.

## BILLS AND NOTES.

1. *Consideration—burden of proof.*

Where a requested instruction erroneously assumes that if a part of the consideration for the note sued on was illegal the

**BILLS AND NOTES—Continued.**

burden of showing to what extent such consideration was illegal devolves upon the defendant and in the absence of such evidence the jury should find the full amount of the note in favor of the plaintiff such requested instruction is properly refused. *Goo Wan Hoy v. McKeague*, 263.

**2. *Illegal consideration.***

A note given in part for intoxicating liquors sold without a license to sell the same, the note not showing on its face how much of the consideration was for such liquors, is indivisible and is void on account of illegality in the consideration. *Goo Wan Hoy v. McKeague*, 263, 267.

See also LIMITATION OF ACTIONS, 1, 2.

**BONDS.**

See APPEAL AND ERROR, 35.

**BOUNDARIES.****1. *Contested title.***

In a proceeding under chapter 31 R. L. 1915 by an alleged owner of land to have the boundaries thereof decided and certified by the boundary commissioner if a contestant files a claim asserting title in himself to a definite portion of the land claimed in the petition the boundary commissioner is without jurisdiction to proceed in the matter and should dismiss the petition. *Re Boundaries of Paunau*, 546.

**2. *Jurisdiction of commissioner.***

A boundary commissioner is authorized to decide and certify boundaries only upon the petition of an owner and his jurisdiction exists only in cases where the petitioner's ownership of the land claimed in his petition is not contested. *Re Boundaries of Paunau*, 546, 556.

**3. *Dispute between adjoining owners.***

Where a dispute as to ownership in a boundary case arises solely by reason of adverse claims as to the common boundary of two adjoining lands a proper case for the commissioner of boundaries is presented. *Re Boundaries of Paunau*, 546, 557.

**BROKERS.****1. *Duties to client.***

A broker who buys stock for a client on margin is required by law to keep the stock on hand and not to sell the same without the consent of the client. *Ter. v. Hart*, 349, 356.

**2. *Legal status when pledgees.***

Where brokers sell stock to a customer on margin the legal title to the stock is in the purchaser and the brokers are pledgees thereof for the repayment of all advances made by them in

**BROKERS—Continued.**

connection with the transaction, the accruing dividends going to the purchaser. *Ter. v. Hart*, 349, 357.

See also EMBEZZLEMENT, 1, 2; TRUSTS, 4.

**CANCELLATION OF INSTRUMENTS.**

1. *False representation—procuring execution of conveyance.*

Where complainant executes a conveyance for the benefit of his wife, without reading the instrument, but relies upon her assurance that the same contained the terms of a prior oral agreement between them, when in fact the terms of the instrument were more favorable to the wife and correspondingly detrimental to the husband, equity will afford relief to the injured party. *Cummins v. Cummins*, 116.

2. *Negligence—failure to read instrument.*

Where a person signs an instrument without reading it, when he can read, he cannot, in the absence of fraud, deceit or misrepresentation, avoid the effect of his signature, but the rule is otherwise where its execution is obtained by a misrepresentation of its contents. *Cummins v. Cummins*, 116, 123.

3. *Negligence.*

One who signs a deed without ascertaining its contents has only himself to blame and cannot have cancellation on that ground. *Nawahie v. Peterson*, 558, 563.

See also FRAUD, 1.

**CHECK.**

See EVIDENCE, 2.

**CARRIERS.**

See COMMERCE, 1; STATES, 2.

**CHATTELS.**

See CONTRACTS, 4, 5, 6, 7, 8, 9; SPECIFIC PERFORMANCE, 1, 2, 3.

**CITIZENS.**

1. *Transfer of allegiance.*

By the provisions of the treaty of Paris a Spanish subject residing in Porto Rico on Apr. 11, 1899, and who continued to reside there for one year thereafter and did not make a declaration before a court of record of his decision to preserve his allegiance to the crown of Spain, became an American subject (*sic*), and was, under the provisions of the Act of Congress of Apr. 12, 1900, a citizen of Porto Rico and did not lose his political status by removing in 1901 from Porto Rico to Hawaii. *In re Sanchez*, 21, 26.

2. *Elections—transfer of allegiance.*

A native of Porto Rico who was an inhabitant thereof on the

**CITIZENS—Continued.**

11th day of April, 1899, and continuously resided there until the summer of 1901, after which he continuously resided in the Territory of Hawaii, claiming at all times after Apr. 11, 1899, to be a subject (*sic*) of the Republic of the United States, was at the passage of the Act of Congress of March 2, 1917, to provide a civil government for Porto Rico and for other purposes, a citizen of Porto Rico as defined by Section 7 of the Act of Congress of April 12, 1900, and is by the provisions of Section 5 of said Act of March 2, 1917, deemed and declared to be a citizen of the United States. *In re Sanchez*, 21.

**COMMERCE.****1. Statutes—common carriers.**

By the provisions of the Act of Congress of September 7, 1916, known as the Shipping Act, one engaged in transporting persons and property on the high seas on regular routes from port to port in the Territory of Hawaii is a common carrier by water in interstate commerce. *Re I. I. S. N. Co.*, 136, 144.

**2. Statutes—common carriers—jurisdiction.**

The shipping board established by the Act of Congress of September 7, 1916, has sole and exclusive jurisdiction to regulate the rates and charges of a common carrier by water in interstate commerce. *Re I. I. S. N. Co.*, 136.

**3. Common carriers—public utilities.**

The public utilities commission has no jurisdiction to regulate the rates and charges of a common carrier by water in interstate commerce for the transportation of persons and property from port to port in the Territory of Hawaii. *Re I. I. S. N. Co.*, 136.

**COMMON CARRIERS.**

See COMMERCE, 1.

**COMMON SOURCE OF TITLE.**

See EVIDENCE, 12.

**CONFESSIONS.**

See CRIMINAL LAW, 6.

**CONSPIRACY.****1. Indictment—allegations—means and object of conspiracy.**

Where the indictment charges a conspiracy to do an unlawful act it is unnecessary to set out the means by which the act was to be accomplished. *Territory v. Theresa Belliveau*, 768.

**2. Indictment—necessary allegations.**

Where the object of the conspiracy is not necessarily unlawful and the criminality of the conspiracy depends upon the unlaw-

## CONSPIRACY—Continued.

fulness of the means contemplated to accomplish the object, the rule is that the indictment must set out the means, that the court may see that there is a criminal conspiracy. *Ter. v. Belliveau*, 768.

## CONSTITUTIONAL LAW.

1. *Statutes—right to question constitutionality.*

It is a well settled rule that a question of the supposed conflict of a statutory provision with the Constitution will not be considered at the instance of one whose rights do not appear to be affected by such provision, but where a statute which so regulates the correlative rights of two classes—as employers and employees—that if void as to one it should be held void as to the other, complaint of a party belonging to one class may require an examination of the statute in both aspects. *Anderson v. Hawn. Drdg. Co.*, 97, 100.

2. *Fifth Amendment—due process.*

Due process of law requires that when one's rights of life, liberty or property are to be adjudicated he must have notice of the proceeding and be given a hearing—or, at least, an opportunity to be heard—thereon. But so far as the statute providing for the proceeding is concerned it is sufficient if it provides for, or, at least does not negative, the right of the adverse party to notice that the proceeding has been commenced. Notice of the time of hearing must be given the parties by the tribunal before which it is pending whether required by statute or rule or not. The failure to give such notice may invalidate the particular proceeding in which the failure occurred, but will not draw in question the statute. *Anderson v. Hawn. Drdg. Co.*, 97, 109.

3. *Seventh admendment—trial by jury.*

The constitutional requirement that in suits at common law the right of trial by jury shall be preserved does not extend to other than actions at common law. The right is not invaded where, as in the case of Workmen's Compensation Acts, the common law action for damages for personal injury sustained by employees in industrial employment has been abolished and a new and fixed measure of compensation is fixed by statute. *Anderson v. Hawn. Drdg. Co.*, 97, 109, 110.

4. *Workmen's Compensation Act—police power.*

The right of the legislature to establish a new system of compensation for injured employees based upon the theory underlying Workmen's Compensation Acts does not necessarily depend upon whether the employee was engaged in "hazardous" or "extra-hazardous" employment, or on whether he is a skilled or unskilled laborer, or upon the classifying of the different kinds

## CONSTITUTIONAL LAW—Continued.

of industrial employment. Nor does it depend on the inclusion in the statute of a provision for a governmental compensation fund to which all employers shall contribute. The legislature having the power to abolish the common law rules with respect to the relations between employers and employees engaged in industrial enterprise for profit in the more hazardous kinds of work, the extension of the new system to all industrial employment is a reasonable and valid exercise of the police power. *Anderson v. Hawn. Drdg. Co.*, 97, 113, 115.

5. *Territorial statutes regulating price of food.*

A territorial statute creating a commission clothed with authority to fix the price or prices at which food or foods shall be sold within the Territory held unconstitutional. *Ter. v. McCandless*, 485.

6. *Limitations upon state's interference with individual.*

It is unlawful to interfere with the privileges of the individual to seek and obtain such compensation as he can for his private property where he neither asks nor receives from the sovereign power any special right or immunity not given to or possessed by every other citizen and where he has not devoted his property to any public use so that the same becomes impressed with a public interest within the meaning of the law. *Ter. v. McCandless*, 485, 499.

7. *Fifth amendment—privilege of witness.*

From the fact that one cannot claim one's constitutional privilege until after taking the oath it necessarily follows that the constitutional privilege cannot until that time be invoked. *Ter. v. Cabrinha*, 621, 624.

See also JUDGMENT, 3; MUNICIPAL CORPORATIONS, 3.

## CONTEMPT.

1. *Appeal—newly discovered evidence.*

On the hearing of an appeal from a judgment of conviction of contempt of court only questions of law may be considered, and newly discovered evidence cannot be admitted. *Re Goo Wan Hoy*, 71.

2. *Different courts.*

The rule that one court cannot punish a contempt against another court applies to the punishing of contempt under our statutes, at least so far as summary proceedings go. *In re Goo Wan Hoy*, 71.

See also APPEAL AND ERROR, 26; EXECUTORS AND ADMINISTRATORS, 3; PROHIBITION, 1.

## CONTINUANCE.

1. *Abuse of discretion.*

## CONTINUANCE—Continued.

It is not an abuse of discretion for the trial judge to refuse at the close of the hearing the verbal request for a continuance which is not supported by a showing that the accused can and will produce further evidence material to his defense although some of the developments during the hearing may tend to surprise the accused. *Re Goo Wan Hoy*, 256.

## CONTRACTORS.

See MECHANICS' LIENS, 3; PAYMENT, 1.

## CONTRACTS.

1. *Officers—public policy.*

A contract entered into by a public officer, the tendency of which is to induce such officer to become remiss in his duty to the public, is contrary to public policy and void. *Miehlstein v. King Market Co.*, 540.

2. *Officers—quantum meruit.*

Where an express contract for services is void as against public policy, neither recovery thereon nor for such services on a *quantum meruit* can be had. *Miehlstein v. King Market Co.*, 540.

3. *Illegality.*

If any part of a non-separable contract is void for illegality or reasons of public policy the taint extends to every part of it, and neither party can enforce any of its provisions against the other. *Miehlstein v. King Market Co.*, 540, 545.

4. *Damages for loss of profits.*

It is a rule that while under some circumstances a party has a right to recover loss of profits as a part of the damages for a breach of contract it is only where the profits are such as would have accrued and grown out of the contract itself as the direct and immediate result of its fulfilment. *Hawn. Pineapple Co. v. Saito*, 787, 793.

5. *Damages for loss of profits.*

But if the profits are such as would have been realized by the party from other independent and collateral undertakings, although entered into in consequence and on the faith of the principal contract, they are too uncertain, remote and speculative to be taken into consideration as a part of the damages occasioned by the breach of the contract. *Hawn. Pineapple Co. v. Saito*, 787, 793.

6. *Measure of damages—resale.*

Where a vendor fails to comply with his contract the general rule for the measure of damages is the difference between the contract price and the market price of the commodity at the time of the breach, but if the contract of purchase is made with a view of a known resale already contracted or any known

## CONTRACTS—Continued.

special use the damages which are contemplated to result from the vendor's breach are those which would naturally result on the basis of the contract for resale or other special use known to the vendor when the contract was made. *Hawn. Pineapple Co. v. Saito*, 787, 794.

7. *Measure of damages—resale.*

The contemplation of damages will include such as ordinarily arise according to the intrinsic nature of the contract and the surrounding facts and circumstances made known to the parties at the time the contract was entered into. *Hawn. Pineapple Co. v. Saito*, 787, 794.

8. *Measure of damages—resale.*

If the vendor has notice that his vendee has contracted to resell the article he will be held liable for loss of profits of such resale if he fails to fulfill his contract. *Hawn. Pineapple Co. v. Saito*, 787, 794.

9. *Measure of damages—resale.*

But where long after the contract was entered into the vendee contracted to resell the article he could not recover as damages his contemplated profits; his damages would be limited to the difference between the contract price with the vendor and the market price of the commodity at the time of the breach of the contract. *Hawn. Pineapple Co. v. Saito*, 787, 796.

10. *Construction.*

The cardinal rule in the interpretation of contracts is to ascertain the intention of the parties and to give effect to that intention if it can be done consistently with legal principles and this intention will be gathered not from particular words and phrases but from the whole context of the agreement. *Hawn. Pineapple Co. v. Saito*, 787, 797.

11. *Reasonableness of construction.*

The rule of reasonableness of construction is that where the language of the contract is contradictory, obscure or ambiguous, or where its meaning is doubtful so that it is susceptible of two constructions, one of which makes it fair, customary and such as prudent men would naturally execute, while the other makes it inequitable, unusual and such as reasonable men would not be likely to enter into, the interpretation which makes it a rational and probable agreement must be preferred. *Hawn. Pineapple Co. v. Saito*, 787, 799.

12. *Mutuality of.*

A contract is bilateral and not unilateral where it contains mutual executory provisions; that is to say, where both parties have bound themselves by reciprocal obligations; and this it would seem meets the modern rule of mutuality. *Lum Wai v.*



## CONTRACTS—Continued.

*Hong Hoon*, 696, 705.

See also CORPORATIONS, 4; EQUITY, 13; FRAUD, 1.

## CONTRACTS, PUBLIC.

See COUNTIES, 1.

## CORPORATIONS.

1. *Estoppel—pleading.*

The corporation defendant having authority to make the contract of insurance in the first instance it follows that it was equally clothed with authority to waive any of the terms of the contract inserted for its protection and thereby estop itself. Where it is alleged that the company waived certain of the clauses or conditions in the policy it is proper to presume that in so doing the officers of the company, in the management of its affairs, possessing authority to act, complied with all of the conditions necessary to the exercise of the power of waiver. *Silverhorn v. Ins. Co.*, 366, 375-6.

2. *Estoppel—waiver.*

The rule is that corporations have power to waive their legal rights and are bound by waiver and estoppel like natural persons. They can claim no exemption from the operation of those rules or maxims which are established to enforce good faith and fair dealing among individuals. *Silverhorn v. Ins. Co.*, 366, 372.

3. *Estoppel—waiver.*

Where the defendant corporation by representations and promises induced plaintiff to forego her right to bring an action on a life insurance policy within one year after the death of the insured as provided in the policy, and the company waived its right to require the payment of the premiums, and the plaintiff did, pursuant to defendant's representations and promises, refrain from bringing suit against the defendant within the time prescribed in the policy, the plaintiff thereby rendered her *quid pro quo* and defendant is estopped from requiring a compliance with said provisions in the policy. *Silverhorn v. Ins. Co.*, 366, 372.

4. *Contracts.*

That corporations are liable upon implied contracts, even where it is required that they should be expressed, is too well settled to dispute. *Silverhorn v. Ins. Co.*, 366, 374.

See also QUO WARRANTO, 1.

## COSTS.

See APPEAL AND ERROR, 16, 50.

## COTENANCY.

See TENANCY IN COMMON.

## COUNTIES.

1. *Purchasing property—tenders—competition.*

White automobile trucks contain parts protected by letters patent and are sold, in the first instance, only by the manufacturer and his authorized agents, but when sold the sale is without restriction as to resale. From these facts it follows that White automobile trucks admit of competition, and where the amount involved is one thousand dollars or more they cannot be purchased by a county without advertising for tenders as required by section 1418, R. L. 1915. *West v. County of Hawaii*, 310.

See also MUNICIPAL CORPORATIONS.

## COURTS.

1. *Circuit court—circuit judge at chambers—judgment.*

Where upon an appeal to the supreme court the record in the case is in such condition that it is difficult to ascertain therefrom whether the judgment appealed from was that of a circuit court or of a circuit judge at chambers, the case having gone to final judgment without any question as to jurisdiction being raised, the nature of the proceeding may be looked to as a determining factor on the question as to in what court the proceeding was had. *Re Goo Wan Hoy*, 71.

2. *Circuit judge at chambers—probate jurisdiction.*

The provision of section 2272, R. L. 1915, giving circuit judges at chambers jurisdiction "to determine the heirs at law of deceased persons and to decree the distribution of intestate estates" does not extend to cases where the decedent left a will though there be a partial intestacy. *Estate of Kaiena*, 148.

3. *Jurisdiction—plea to.*

Objection for want of jurisdiction, if it exists, may be raised by answer, or at any subsequent stage of the proceedings and may be raised for the first time on appeal. It may, as a matter of fact, be raised by the court of its own motion. *Territory v. Correa*, 165, 167.

4. *Jurisdiction in divorce.*

It is elementary that in the early history of jurisprudence in England the common law courts exercised no jurisdiction over divorce cases, jurisdiction in such matters resting entirely with the ecclesiastical courts of the realm. In the several States of the Union that jurisdiction rests alone with those courts upon which it has been expressly conferred by legislative enactment. *Peterson v. Peterson*, 239.

5. *Land court—jurisdiction.*

The land court is a court of limited jurisdiction created for the special purpose of carrying into effect the Torrens title scheme,

## COURTS—Continued.

derives all its powers from the statute relating to it and can exercise no power not found within those statutes. *In Re Rosenbledt*, 298, 308.

6. *Land court—registering title between answering contestants.* The land court is given power to register the title of the applicant only and has no power to register the title of answering contestants between whom exist a diversity of interests. *In Re Rosenbledt*, 298, 308.

7. *Power to enforce orders.*

Where power is conferred upon a court or judge to direct that a certain thing be done the court or judge is inferentially clothed with authority to require the performance of all acts preliminary or incidental to the accomplishment of the ultimate result. *Chinese Society v. Yee Yap*, 377.

8. *Nunc pro tunc orders.*

Before one has the right to invoke the power of the court to enter orders *nunc pro tunc* it should be made to appear affirmatively that the delay was occasioned either by the court or the opposite party and not by the complaining party. *Makainai v. Lalakea*, 518.

9. *Jurisdiction to alter judgment.*

After a court of limited jurisdiction has entered a final judgment in the case the power of the court to alter the judgment has ceased and any attempt to do so would be extrajudicial and without force. *Akatsuka v. McKay*, 600, 604.

10. *Power to correct records.*

A district magistrate has authority to correct the minutes of proceedings of his court where the same are incorrect before certifying the record to the appellate court. *Akatsuka v. McKay*, 600, 605.

11. *Rules.*

The rules of the supreme court are provided for the convenience, guidance and protection of all those having business before it and any attempt to ignore or evade the rules should be summarily checked. *First Trust Co. v. Cabrinha*, 655, 657.

12. *Rules.*

Reasonable compliance with the rules of court must be required if they are to serve the ends for which they were adopted. *Estate of Brown*, 711, 713.

*Terms of Court.* See TRIAL, 2.

See also APPEAL AND ERROR, 45; CONTEMPT, 2.

## CRIMINAL LAW.

1. *Sentence.*

When a sentence is imposed under the indeterminate sentence

## CRIMINAL LAW—Continued.

laws of this Territory the term of the sentence is the maximum period fixed by the court. *Territory v. Waiamau*, 247, 249.

2. *Parole—effect of.*

After the prisoner has served the minimum term provided by law or imposed by the sentence of the court he may be allowed to go on parole but he is still in the legal custody and control of the prison authorities and is deemed still to be serving out the sentence imposed upon him. *Territory v. Waiamau*, 247, 249.

3. *Cumulative sentences.*

Courts may impose cumulative sentences and in so doing the term of the last sentence should commence from the termination of the sentence next preceding. *Territory v. Waiamau*, 247, 249.

4. *Exception—harmless error.*

A motion by defendant at the close of the prosecution's case for an instructed verdict in his favor is equivalent to a demurrer to the evidence and where the motion is erroneously overruled the error becomes harmless if the defendant fails to rest his case on the evidence for the prosecution and introduces evidence in his own behalf which, with the evidence for the prosecution, justifies the verdict against him. *Territory v. Hart*, 349, 355.

5. *Evidence—cross-examination of defendant.*

Where a defendant takes the witness stand in his own behalf he may on cross-examination be asked about any matter pertinent to the issues although he has not testified on direct examination as to all of the things about which he is asked. *Territory v. Hart*, 349, 359.

6. *Admission of confessions.*

Where there is evidence sufficient to show *prima facie* that the crime alleged in the indictment has been committed the confession by the defendant that he committed the crime is admissible to connect him with the crime and to corroborate the evidence proving the commission of the crime. *Territory v. Hart*, 349, 358.

7. *Instructions.*

The defendant in a criminal trial has the right to have the court instruct the jury in the law applicable to his contention, if supported by substantial evidence, however weak, unsatisfactory or inconclusive it may appear to the court. *Territory v. Kaeha*, 467, 471.

8. *Erroneous instructions.*

An erroneous instruction, clearly prejudicial, cannot be cured by another instruction which correctly states the law but does not call the attention of the jury to the erroneous instruction. *Territory v. Kaeha*, 467, 471.

## CRIMINAL LAW—Continued.

9. *Conduct of judge.*

The trial judge should not in the examination of a witness intimate any opinion upon the facts, assume the prisoner's guilt, or use any expression calculated to prejudice the rights of either party. *Territory v. Kekipi*, 500.

10. *False pretenses—evidence.*

On a trial for obtaining money by false pretenses the indorsement on a check purporting to have been written by defendant is not admissible against him until it is shown to have been in his handwriting. *Territory v. Alohihea*, 570.

11. *Instructions—comment.*

In this jurisdiction a charge which comments upon the weight of opinion evidence in comparison with direct evidence is improper as invading the province of the jury. *Ter. v. Goo Wan Hoy*, 721, 728.

12. *Evidence—cross-examination of accused.*

An accused who voluntarily becomes a witness in his own behalf is subject to the same cross-examination upon collateral matters affecting his credibility as other witnesses. *Ter. v. Goo Wan Hoy*, 721, 729.

13. *Instructions.*

An instruction which authorizes the jury to convict without having found that the crime was committed by the defendant in the manner alleged in the indictment is prejudicial error. *Territory v. Cabrinha*, 757.

## DAMAGES.

1. *Punitive—principal and agent.*

Punitive or vindictive damages are not to be allowed as against the principal unless the principal participated in the wrongful act of the agent or expressly or impliedly by his conduct authorized or approved it either before or after it was committed. *Kealoha v. Halawa Plant.*, 579, 589.

See also ACTION, 1, 2; CONSTITUTIONAL LAW, 3; CONTRACTS, 4, 5, 6, 7, 8, 9; NEGLIGENCE, 3; NEW TRIAL, 4; OFFICERS, 1.

## DECISIONS.

*Effect of on Appeal.* See APPEAL AND ERROR, 40.

See also TRIAL, 1, 14; TAXATION, 1, 11.

## DEEDS.

1. *Uncertainty of description.*

A deed conveying a number of pieces of property, which describes one piece of property as "the house lot at Halakaa, Lahaina, Territory of Hawaii," without reference to any other deed, instrument or existing condition capable of ascertainment for

## DEEDS—Continued.

the purpose of identifying such house-lot, is void for uncertainty. *Hayselden v. Lincoln*, 169.

2. *Construction—identification of land.*

Where a general description in a deed is so indefinite that the land therein cannot be identified, other instruments not referred to in the deed are not admissible for the purpose of clearing away the uncertainty. *Hayselden v. Lincoln*, 169, 174.

3. *Description of premises conveyed.*

The description of the premises conveyed by a deed must be sufficiently definite and certain to enable the land to be identified, otherwise it will be void for uncertainty. *Hayselden v. Lincoln*, 169, 174.

4. *Rule governing construction of deeds.*

The instrument which the court is asked to correct and construe being voluntary and testamentary in character the law applicable to wills in like cases applies here. *Bertelmann v. Cockett*, 230, 235.

5. *Construction—mistake.*

It is not to be presumed that a mistake has been made by the grantor in the provisions of such an instrument as this merely because its terms amount to what, (if it were a will) is sometimes called an unnatural will because a testator may make an unnatural will if he does so freely and with a sound mind. *Bertelmann v. Cockett*, 230, 237.

6. *Construction—repugnant clauses.*

It is a rule of law that in the construction of deeds if two clauses therein are so repugnant that they both cannot stand the first will be sustained and the latter rejected. *Kahaulelio v. Ihihi*, 292, 295. *In re Rosenbledt*, 298, 305.

7. *Construction.*

Terms in a deed which vest a fee in the first taker are not controlled by other parts of the instrument showing an intention to give a less estate. *Kahaulelio v. Ihihi*, 292, 296.

8. *Construction—intent.*

While the intent and not the words is the principal thing to be regarded yet in searching for the intent we are hedged about by certain positive rules of law which must be heeded. One of such rules is that a grantor cannot destroy his own grant however much he may modify it or load it with conditions. Having once granted an estate in his deed no subsequent clause, even in the same deed, can operate to nullify it. *Kahaulelio v. Ihihi*, 292, 297.

9. *Construction—inoperative clauses.*

Where the granting clause conveys to grantee a title in fee simple phrases therein expressing the motive of the grantor for

**DEEDS—Continued.**

making the deed are inoperative and do not limit the grant. *In Re Rosenbledt*, 298, 304.

10. *Construction—heirs.*

The word "heirs" is not necessary in a deed in order to convey the fee to the grantee. *In Re Rosenbledt*, 298, 304.

11. *Construction—"forever."*

The absence of the word "forever" from the granting clause of a deed does not limit the grant to a life estate; the word was of no particular signification at common law and we have no statute requiring its use. *In Re Rosenbledt*, 298.

12. *Repugnancy between premises and habendum.*

Where the granting clause of a deed conveys the title in fee to the grantee and the habendum in terms limits it to an estate for life with remainder to the lawfully begotten children of the grantee there is a repugnancy between the granting clause and the habendum, the former controlling to the exclusion of the latter, the grantee taking the fee simple title under the deed. *In Re Rosenbledt*, 298, 305.

13. *Naming grantee.*

Where the granting clause of a deed fails to name the grantee or it is doubtful therefrom in whom the estate is intended to vest the omission may be cured or the uncertainty cleared away by the habendum wherein the grantee is named. *Naopala v. Hina*, 341, 344.

14. *Construction—lapse of time.*

The construction placed upon the instrument by the parties themselves should govern, especially after a time long enough to create prescriptive rights thereunder has elapsed. *Levy v. Lovell*, 716, 720.

15. *Construction—intent of grantor.*

In the construction of all deeds and grants the intention of the grantor, when ascertained, should be given full effect when not contrary to law. *Levy v. Lovell*, 716, 719.

16. *Partition.*

The fact that a party who has no interest in the property joins in a partition deed does not vest any interest in him although the deed purports so to do, there being no consideration for the grant to him. *Kathenui v. Aona*, 764.

See also EQUITY, 3, 4, 7.

**DEFAULTS.**

See DIVORCE, 1, 2; JUDGMENT, 1, 7.

**DESCENT AND DISTRIBUTION.**

See BENEFICIAL ASSOCIATION; COURTS, 2; EXECUTORS AND ADMINISTRATORS, 1, 2, 4.

## DISCOVERY.

See EQUITY, 6. 7.

## DISMISSAL, DISCONTINUANCE AND NONSUIT.

See EQUITY, 1; NEW TRIAL, 5.

## DISTRICT MAGISTRATE.

1. *Pleadings in district court.*

The rule which dispenses with rigid forms of pleading in the district courts does not obviate the necessity of stating all the essential facts required to entitle one to a special order in a statutory proceeding. *Thompson v. Gill*, 16, 19.

2. *Jurisdiction—mechanic's lien.*

Plaintiff in an action in the district court commenced to enforce a mechanic's lien alleged that after the materials for which the lien is claimed were furnished, but before notice of lien was filed and served, the defendant J., without consideration and to defraud plaintiff of his lien, conveyed through an intermediary to his wife (one of the defendants) the premises upon which the lien is claimed; the wife filed a plea to the jurisdiction of the court upon the ground that title to real estate is involved, supported by affidavit tending to show that the transaction was bona fide, for a valuable consideration, and without knowledge of liability of the premises as to the lien claimed: Held, that the district court correctly sustained the plea and dismissed the action. *Hoffschlaeger Co. v. Jones*, 74.

3. *Jurisdiction—title to real estate.*

The inhibition contained in the proviso of section 2297 as to district courts exercising jurisdiction in actions in which the title to real estate shall come in question is to the action as a whole and as to all of the parts thereof. *Hoffschlaeger Co. v. Jones*, 74. See also APPEAL AND ERROR, 9; COURTS, 3, 10; LANDLORD AND TENANT, 1, 2; OFFICERS, 1; PROCESS, 1.

## DIVORCE.

1. *Judgment—opening default.*

The technical law of default does not apply to an action of divorce and where there has been an ex parte hearing and a decree of divorce in favor of the libellant the default should be opened, the decree set aside and the defendant permitted to defend on the showing made in this case as set forth in the opinion, although the showing might not be sufficient in an ordinary action. *Beall v. Beall*, 29.

2. *Judgment—opening default.*

The libellee in a divorce case was served out of the jurisdiction of the court; a decree of divorce rendered against him on ex parte hearing; a motion to open the default and set aside the decree was promptly made, the motion being supported by affi-



DIVORCE—Continued.

davit showing that the libellee was anxious to defend and had cabled his attorney to appear for him, but owing to the temporary absence of his attorney libellee was not represented at the hearing; the affidavit also showed that the libellee denied nearly all the allegations of the libel and attempted to explain the others: Held, that the motion should have been sustained and it was an abuse of discretion to deny the same. *Beall v. Beall*, 29, 33.

3. *Jurisdiction—proceeding in rem.*

Owing to the fact that an action for divorce is in the nature of a proceeding in rem under certain circumstances a court may render a valid decree of divorce although it never acquired actual jurisdiction of the person of the defendant. *Peterson v. Peterson*, 239, 243.

4. *Alimony—jurisdiction of defendant required.*

A decree for the payment of money as alimony is essentially in personam and it is therefore totally void in the absence of actual jurisdiction over the person and property of the one against whom it is awarded. *Peterson v. Peterson*, 239, 244.

See also COURTS, 4.

DRAFT, SELECTIVE.

See ELECTIONS, 2.

EASEMENTS.

1. *Water rights—abandonment—non-user.*

Mere non-user of water of however long duration does not constitute an abandonment of an appurtenant water right where there has been no substituted use, and there are no intervening equities or there has been no adverse user. *Carter v. Territory*, 47. 56.

See also ABANDONMENT, 1; WATERS AND WATERCOURSES.

EJECTMENT.

1. *Pleading—proof.*

The plaintiff in ejectment must describe in his complaint the premises which he seeks to recover with certainty and he must prove title to the land so described. *Hayselden v. Lincoln*, 169, 173.

2. *By one out of possession.*

One who is out of possession may, in an action of ejectment, test the validity of the instrument under which the respondent claims title. *Makainai v. Lalakea*, 268, 274.

See also EQUITY, 7; TENANCY IN COMMON, 1.

ELECTIONS.

1. *Moot question—registration.*

The election laws provide for a permanent registration of voters;

**ELECTIONS—Continued.**

the right of registration of one entitled thereto is a continuing one; and when this right is sought to be enforced by mandamus the issue raised by a return to the alternative writ does not become a moot question by the happening of a primary election soon after the proceedings for mandamus were instituted. *In re Sanchez*, 21.

2. *Right of soldier to vote.*

Act 197 of the Session Laws of 1917 extended to every registered voter of the Territory absent from the precinct of his residence on election day by reason of having been called into the military service of his country, either by the governor or the president, the right to vote at one of the polling places provided for by section 2 of said act. *Dwight v. Kalauokalani*, 454, 459.

See also CITIZENS, 1, 2; MANDAMUS, 1; STATUTES, 7.

**EMBEZZLEMENT.**

1. *Conversion—use and benefit of accused.*

The defendant bought capital stock of a corporation for a client on margin from a broker in New York; the defendant controlled the account for the stock with the consent of his client and without the latter's consent had the account for the stock sold and the realization therefor credited to another account for which defendant was liable: Held, that the conversion was for the use and benefit of the defendant within the meaning of the statute defining embezzlement. *Territory v. Hart*, 349, 355.

2. *Jurisdiction.*

Where the defendant, operating in the Territory of Hawaii, cabled from Honolulu to New York directing a broker in New York to sell certain stock which was in his control for a client, the proceeds of which defendant embezzled, the crime being commenced in the Territory of Hawaii the trial court in Hawaii has jurisdiction to indict, try and punish the defendant for such crime. *Territory v. Hart*, 349, 359.

3. *Control by accused with owner's consent.*

Where the defendant buys stock on margin for a client and controls the account therefor, the client instructing him to hold accruing dividends to accumulate and apply on the purchase price and to not sell the stock, the control of the stock is in the defendant with the consent and authority of the owner within the meaning of the provisions of the statute defining embezzlement. *Ter. v. Hart*, 349.

**EMINENT DOMAIN.**

See MUNICIPAL CORPORATIONS, 2, 3.

**EQUITY.**

1. *Dismissal of bill—practice.*

It is not correct practice to dismiss a bill in equity for want of

## EQUITY—Continued.

equity in the bill, on motion of the respondent after answer filed unless the respondent admits the truth of all the facts averred in the bill and submits the case without leave to offer evidence in the event that his motion shall be denied. *Mutual Telephone Co. v. Nippu Jiji*, 156, 162.

2. *Dismissal when bill without equity.*

Dismissal of a bill in equity without requiring respondent to admit the facts and rest its case, though erroneous, would not be reversible error, if, in fact, there was no equity in the bill. *Mutual Telephone Co. v. Nippu Jiji Co.*, 156, 162.

3. *Mistake—jurisdiction.*

A court of equity has jurisdiction to correct mistakes in a trust deed testamentary in character when the mistake is apparent on the face of the instrument or may be made out by a due construction of its terms. *Bertelmann v. Cockett*, 230, 236.

4. *Insufficiency of bill to show mistake.*

No mistake being apparent on the face of the instrument and none that can be made out by a due construction of its terms the bill does not state a case for relief in equity on the ground of a mistake. *Bertelmann v. Cockett*, 230.

5. *Jurisdiction.*

The several circuit judges may exercise their equity jurisdiction when and only when the party has no plain, adequate and complete remedy at law. *Makainai v. Lalakea*, 268, 272.

6. *Pleading—discovery.*

A bill for relief upon the ground of discovery must aver that the facts sought to be discovered are material to the cause of action; that the party has no means of proving them in a court of law and that the discovery of them by respondent is indispensable as proof. *Makainai v. Lalakea*, 268, 275.

7. *Void deed—accounting.*

While ejectment is the proper remedy to recover land from one holding under a void deed, equity will entertain jurisdiction where the plaintiff cannot obtain complete relief at law and alleges facts showing that he is entitled to a discovery and accounting for rents of the land in controversy. *Makainai v. Lalakea*, 268, 275.

8. *Accounting.*

Equity will relieve where the bill discloses that there is an account between the parties which cannot be conveniently and properly adjusted and settled in an action at law. *Makainai v. Lalakea*, 268, 274.

9. *Decree—certainty.*

A decree in equity foreclosing a mortgage securing a note pay-

## EQUITY—Continued.

able in instalments which sets forth the note *in haec verba*, finds that the first instalment thereof is due and unpaid, and finds that the conditions of the mortgage had been broken by the nonpayment of the note, is not void for uncertainty. *Brown v. Walker*, 285, 288.

10. *Lease—relief from forfeiture—damages.*

Equity having jurisdiction to relieve from a forfeiture for non-payment of rent, water and sewer rates, the decree properly offset the rental value of the demised premises during the time they were withheld by the lessor from one who had purchased the leasehold at execution sale and tendered the rent due, against the rent in arrears. *Brown v. Walker*, 285, 291.

11. *Jurisdiction—multiplicity of suits.*

The mere fact that there exist divers causes of action which may be the foundation of as many different suits between the parties, is in itself not sufficient ground to confer jurisdiction upon a court of equity. *Lum Wai v. Hong Hoon*, 696, 702.

12. *Jurisdiction—multiplicity of suits.*

In the case at bar the complainants might at their own option bring successive suits against respondents as the breaches of the contract occur or they might remain quiescent until the expiration of the contract and then bring one action at law for the recovery of the entire damages sustained by them. This being a matter entirely within their own control the reason for the interference of a court of equity fails. *Lum Wai v. Hong Hoon*, 696, 703.

13. *Mutuality of remedy.*

A contract to be enforceable in equity must be mutual but when payment under the contract is to be made in money mutuality of remedy is not the test for the right to the remedy. The mutuality required is that which is necessary for creating a contract enforceable on both sides in some manner but not necessarily enforceable on both sides by specific performance. *Lum Wai v. Hong Hoon*, 696, 704-5.

14. *Practice—laches.*

Where a cause of action has accrued for over twenty years and the petitioner has remained dormant during all that time and does not set forth any excuse or justification for her delay she is guilty of such laches as will warrant a court of equity in refusing her relief. *Levy v. Lovell*, 716.

See ACCOUNTS AND ACCOUNTING, 1, 2; EXECUTION, 1; INJUNCTION, 1; PARTIES, 1; SPECIFIC PERFORMANCE, 1, 2, 3, 4; WILLS, 2.

## ESTATES.

Estates *in futuro* were not permissible under the common law,

## ESTATES—Continued.

yet the contrary rule prevails in Hawaii. *Kahaulelio v. Ihihi*, 292, 295.

## ESTATES TAIL.

Neither an estate tail nor a fee simple conditional can exist in these islands although both were recognized at common law. *Kahaulelio v. Ihihi*, 292, 295. *In re Rosenbledt*, 298, 303.

## ESTOPPEL.

1. *How created.*

Estoppels are created by the party to be bound and are not manufactured by his opponent and cast upon him. *Kaihenui v. Aona*, 764, 766.

See also CORPORATIONS, 1, 2, 3; VENDOR AND PURCHASER, 1.

## EVIDENCE.

1. *Impeaching and supporting witness.*

Evidence is not admissible to prove that the reputation of a witness for truth and veracity is good where there has been no attempt to impeach him by showing that his reputation for truth and veracity is bad. *Brown v. Walker*, 285, 291.

2. *Check as.*

The admission of the indorsement of the payee on a check in evidence, without proof of its authenticity, is error. *Ter. v. Alohikea*, 570.

3. *Private writings.*

The general rule on the subject of proving private writings is that before they are receivable in evidence their due and valid execution or their genuineness and authority must be established. *Ter. v. Alohikea*, 570, 571.

4. *Private writings—indorsements.*

Indorsements upon the back of written instruments are independent writings and can be read in evidence only after proof made that they are signed by the party sought to be charged. *Ter. v. Alohikea*, 570, 571.

5. *Exhibits not introduced.*

The court is bound to ignore documents which while referred to in the record, were never identified and introduced in evidence. *Kealoha v. Halawa Plant.*, 579, 585.

6. *Private writings.*

An entry from a private memorandum book which is read into the record is competent evidence, even though the book is not offered in evidence. *Akatsuka v. McKay*, 600, 606.

7. *Presumptions.*

It is a presumption of law that when the evidence of a thing is

**EVIDENCE—Continued.**

once established by proof the law presumes its continuance until the contrary is shown or until a different presumption arises from the nature of the subject in question; but presumptions do not run backward; they are not retroactive. *Ter. v. Fernandez*, 617, 620.

8. *Expert—qualifications.*

The question whether a witness is qualified as an expert is largely within the discretion of the trial judge. *Kamahalo v. Coelho*, 689, 695.

9. *Expert—handwriting.*

A person whose business for fifteen years required him frequently to make comparisons of handwritings is competent to testify as an expert in regard thereto, though he testifies that he is not an expert in the sense of making it his business. *Kamahalo v. Coelho*, 689, 695. *Territory v. Belliveau*, 768, 772.

10. *Preliminary examination of witness—signatures.*

It is proper for the court to permit a witness who has written certain signatures which are to be offered in evidence to be examined and cross-examined as to when, where and under what circumstances he wrote said signatures for the purpose of passing upon their admissibility, without regard to whether they are in fact admissible. *Ter. v. Goo Wan Hoy*, 721, 724.

11. *Competency of witnesses—signatures.*

Upon the cross-examination of a witness to determine whether or not he is competent to give his opinion as to the genuineness of another's signature it is not error to exclude evidence which would show that the witness could neither read nor write English as that would affect the weight and not the admissibility of his testimony. *Ter. v. Goo Wan Hoy*, 721, 726.

12. *Common source of title.*

The fact that a plaintiff offers in evidence a conveyance which he designates as a common source of title does not preclude the defendant from contradicting such evidence and denying that any common source of title exists. *Kaihenui v. Aona*, 764.

See also CRIMINAL LAW, 5, 6, 10, 12; PRINCIPAL AND AGENT, 3; RAPE, 3; TRIAL, 8, 9, 10, 13, 15, 17.

**EXCEPTIONS, BILL OF.**

1. *Service on adverse party.*

The same rules governing service of notice of appeal on adverse party also apply to bills of exceptions. *Kealoha v. Halawa Plant.*, 436.

2. *Record necessary on exceptions.*

Where a cause is brought to the supreme court by bill of exceptions it is only necessary for the appellant to bring up sufficient of the proceedings of the court below to enable the ap-

**EXCEPTIONS, BILL OF—Continued.**

pellate court to intelligently determine the merits of the exceptions. *Ter. v. Kealoʻha*, 713, 714.

See also APPEAL AND ERROR, 20, 33, 34, 38, 39.

**EXECUTION.****1. Equity—jurisdiction.**

An execution may issue upon a decree for money rendered in a suit in equity where the court rendering the decree had jurisdiction of the subject matter of the suit and of the parties. *Brown v. Walker*, 285, 289.

**EXECUTORS AND ADMINISTRATORS.****1. Title to real estate of decedent.**

Title to real estate vests at once on the death of the owner in his heirs or devisees, and without an order of court. An executor takes no title to the real estate of his testator nor power over the same except under special circumstances for a certain limited purpose. *Estate of Kaiena*, 148.

**2. Distribution of estate.**

An administrator is not authorized to distribute an estate except in conformity with the order of distribution unless he acts under clear and specific instructions of an heir at law with full and complete knowledge of her rights and her distributive share in the estate. *Estate of Spitz*, 649.

**3. Contempt.**

Contempt proceedings lie against an administrator to compel him to distribute an estate in conformity with the order of distribution made on his petition for discharge. *Estate of Spitz*, 649.

**4. Voluntary payments by.**

Voluntary payments to distributees without an order or decree of court authorizing the same are made by the representative at his own peril. *Estate of Spitz*, 649, 654.

**FALSE IMPRISONMENT.**

See PLEADING, 1.

**FALSE PRETENSES.**

See CRIMINAL LAW, 10; INDICTMENT AND INFORMATION, 2, 3.

**FISH AND GAME.****1. Closed season.**

The power of the legislature to prescribe a closed season for game and fish, even though the same may incidentally affect game and fish privately owned and propagated, has always been treated as within the proper domain of the police power. *Ter. v. McCandless*, 485, 495.

**FOOD.**

See CONSTITUTIONAL LAW, 5; WAR, 2, 3.

**FORFEITURES.**

See EQUITY, 10; LANDLORD AND TENANT, 1; VENDOR AND PURCHASER, 1, 2, 3.

**FRAUD.**

1. *Misrepresentation—as to portions of contract.*

A fraudulent misrepresentation, even though it relates only to a portion of a contract, furnishes a complete defense of an enforcement of the whole. *Cummins v. Cummins*, 116, 121.

2. *Pleading.*

In alleging fraud the rules of good pleading require that the inculpatory facts be specifically alleged so that the pleading on its face discloses the mode in which the fraud was accomplished. *Makainai v. Lalakea*, 268, 271.

3. *Pleading.*

In pleading fraud either at law or in equity the specific facts constituting the fraud must be stated in the declaration or petition, not conclusions. *Nawahie v. Peterson*, 558, 564.

See also CANCELLATION OF INSTRUMENTS, 1, 2, 3; FRAUDULENT CONVEYANCES, 1, 2, 3, 4; HUSBAND AND WIFE, 1.

**FRAUDULENT CONVEYANCES.**

1. *When void as to creditors.*

A transfer to defraud a creditor is void as to the creditor and the *bona fides* of the transfer may be adjudicated in an action at law. *Hoffschlaeger Co. v. Jones*, 74, 79.

2. *Presumption where vendee is in possession.*

The law presumes the possession of the vendee to have been lawfully acquired, and where it appears that a sufficient consideration was paid the transfer will be upheld unless it be affirmatively shown that he purchased in bad faith. *Sung So Lim v. Miyauchi*, 152, 156.

3. *Intent of parties.*

The rule is settled that a conveyance by a debtor to one of his creditors in payment of his claim is not invalidated by the fact that it was made with an intent on the part of the vendor to defraud other creditors, where such intent is not known to, or participated in, by the purchaser. *Sung So Lim v. Miyauchi*, 152, 155.

4. *Test of.*

The test of a fraudulent conveyance for a valuable consideration is the mutual intent of the parties. Fraudulent intent on the part of one is not sufficient without a corresponding intent on the part of the other. *Sung So Lim v. Miyauchi*, 152, 155.



**FRONTAGE TAX.**

See MUNICIPAL CORPORATIONS.

**GARNISHMENT.**

1. *Property subject to.*

A warrant for the salary of a government beneficiary issuable to a judgment creditor under a garnishment order is not exempt from attachment in another garnishment proceeding upon the ground that it is property *in custodia legis*. *Thompson v. Gill*, 16, 18.

2. *Property subject to—attorney's interest.*

The fact that by an agreement between the owner of a judgment obtained by garnishment against a government beneficiary and his attorneys the latter were to receive a certain percentage of the sum recovered, the judgment not having been assigned, would not prevent the attachment of the salary warrant in another garnishment proceeding by a creditor of the owner of the judgment, if the proceedings could otherwise be maintained. *Thompson v. Gill*, 16, 19.

3. *Attorney's fees.*

Statutory attorney's fees in assumpsit cases are taxed as part of the judgment, and as between the owner of the judgment and his creditors belong to him and not his attorneys. *Thompson v. Gill*, 16, 19.

4. *Attachment of debt.*

In order to sustain a garnishment under section 2808, R. L. 1915, the applicant must show that he is a judgment creditor or has succeeded to the rights of a judgment creditor under a valid judgment. *Thompson v. Gill*, 16, 19.

**GRAND JURY.**

See INDICTMENT AND INFORMATION, 3.

**GROSS CHEAT.**

See INDICTMENT AND INFORMATION, 1.

**HANDWRITING.**

See EVIDENCE, 9, 10.

**HOMICIDE.**

1. *Intent.*

In determining the criminality of the act of killing it is immaterial whether the intent was to kill the person killed, or whether the death of such person was the accidental or otherwise unintentional result of the intent to kill someone else. *Territory v. Alcantara*, 197, 202.

2. *Manslaughter—instructions.*

On the trial of a person accused of committing the crime of

**HOMICIDE—Continued.**

murder, if there be no evidence upon which the jury can properly find the defendant guilty of an offense of a lesser degree than the one charged it is not error to instruct the jury that it cannot return a verdict of guilty of manslaughter or of any offense less than the one charged. *Territory v. Alcantara*, 197, 203.

3. *Murder—instructions.*

But in a prosecution for murder, where there is some substantial evidence, however weak and inconclusive it may appear to the trial court, that would tend to mitigate the homicide to manslaughter, it is error for the court to refuse to instruct the jury concerning manslaughter. Held, in this case, that such instruction should have been given. *Territory v. Alcantara*, 197, 209.

4. *Murder—questions for jury.*

On a trial under an indictment for murder, where it is shown that the defendant killed the deceased by shooting him with a shotgun, and the evidence for the state tended to show that the killing was intentional, while the evidence for the defendant tended to show that it was accidental, whether or not the killing was intentional or not is for the determination of the jury. *Ter. v. Kaeha*, 467, 471.

5. *Murder—degree.*

Murder committed in the commission or attempt to commit a crime not punishable with death and not committed with extreme atrocity or cruelty is not, *per se*, murder in the first degree. *Ter. v. Kaeha*, 467, 470.

**HUIS.**

1. *Relation of members.*

The members of a hui are tenants in common holding proportionately according to their respective shares. *Scott v. Pilipo*, 277, 282.

2. *One member holding under another.*

One member of a hui may rent and hold from another member a specific portion of the hui lands claimed by the latter. *Scott v. Pilipo*, 382.

See also LANDLORD AND TENANT, 3.

**HUSBAND AND WIFE.**

1. *Fraud—of wife.*

If a wife by fraud and imposition on her husband induces him voluntarily to transfer property to her for her benefit a court of equity will afford him relief and compel reconveyance. *Cummins v. Cummins*, 116.

2. *Separate maintenance—appealable order.*

In an equity suit by a wife against her husband for separate maintenance an order issued compelling the husband to support

## HUSBAND AND WIFE—Continued.

his wife *pendente lite* is appealable. *Reynolds v. Reynolds*, 510, 517.

3. *Separate maintenance—appealable order.*

A provision inserted in an order for separate maintenance defining it as temporary and subject to change or modification in the discretion of the judge does not convert it into an interlocutory order nor alter its status as final and appealable. *Reynolds v. Reynolds*, 510, 517.

4. *Actions between—parties.*

A married woman cannot sue her husband in equity without the interposition of a next friend. *Reynolds v. Reynolds*, 632.

## IMPROVEMENT STATUTES.

See MUNICIPAL CORPORATIONS.

## INDICTMENT AND INFORMATION.

1. *Words of the statute.*

Where a statute fully defines the offense in clear and unmistakable terms a charge in the language of the statute is sufficient but we do not find that the statute of gross cheat, that is, section 3988 R. L. 1915, contains those descriptive elements which would bring it within the category of the statutes just mentioned. *Ter. v. Pupuhi*, 565, 567.

2. *False pretenses.*

Where the defendant is charged with false pretenses the indictment must not only set out the pretenses but must set them out with such particularity as to enable the court to determine whether they are such pretenses as come within the statute and as to apprise the accused of the charge against him. *Ter. v. Pupuhi*, 565, 567.

3. *Sufficiency.*

An indictment charging that the defendant "did designedly, by false pretenses, and with intent to defraud, obtain from others, to wit, Joe Botelho, John de Costa, Antone S. Madeira and Joe Antone Rodrigues, money of the amount and value to wit twenty five hundred dollars" is confined to a bare repetition of the words of the statute and is demurrable. *Ter. v. Pupuhi*, 565, 568.

4. *Accused as witness before grand jury.*

It is not sufficient to quash an indictment that the indicted person was subpoenaed to appear and did appear and testify before the grand jury as to matters material to the offense charged in the indictment, when it appears that he was informed of his right to refuse to answer any question the answer to which in his opinion might tend to incriminate him. *Ter. v. Cabrinha*, 621.

## INDICTMENT AND INFORMATION—Continued.

5. *Statutes—section 168 R. L. 1915 construed.*

Section 168 R. L. 1915 prohibits an officer of a county from making a sale of goods or property in which he is pecuniarily interested to the county even though he take no official action in behalf of the county in consummating such sale. An indictment under said section which charges the defendant with having, in behalf of a copartnership of which he was a member and in which he was pecuniarily interested, made an agreement with the board of supervisors, of which he was a member, for the sale to the county by said copartnership of goods, wares, etc., without charging that he as such official participated in the making of said agreement, is good as against a general demurrer. *Territory v. Cabrinha*, 757, 759.

See also CONSPIRACY, 1, 2.

## INFANTS.

See ADVERSE POSSESSION, 2, 4, 7.

## INJUNCTION.

1. *Jurisdiction of equity to restrain destruction of property.*

An owner in possession of property may invoke the process of a court of equity to restrain parties who have repeatedly trespassed upon his property and caused destruction of a part thereof and who threaten future trespasses and acts of destruction. *Yee Hop v. Colburn*, 658.

## INHERITANCE TAX.

See TAXATION, 10.

## INN KEEPERS.

See STATES, 2.

## INSANE PERSONS.

1. *Suit by next friend—proceedings.*

A next friend may institute a suit for a person who is alleged to be mentally incompetent, but where an issue is raised by the party's denial of such mental incompetency the issue thus raised is properly determined by the court in limine before further steps are taken in the suit. *Nawahie v. Kamalani*, 82, 84.

## INSTRUCTIONS.

See ASSAULT AND BATTERY, 1; CRIMINAL LAW, 7, 8, 11, 13; HOMICIDE, 2, 3; RAPE, 3; TRIAL, 11, 12.

## INSURANCE.

See CORPORATIONS, 3; WILLS, 5.

## INTOXICATING LIQUORS.

See BILLS AND NOTES, 2.

## JOINT TENANCY.

1. *Tenancy in common.*

If there is a doubt as to whether the grantor intended by his deed to vest an estate in joint tenancy or in tenancy in common the deed must, under the provisions of section 3132 R. L. 1915, be construed to create an estate in common and not one in joint tenancy or by entirety. If, however, it manifestly appears from the tenor of the deed that it was intended to create an estate in joint tenancy the deed must be given that effect. *Naopala v. Hina*, 341, 344.

## JUDGES.

See COURTS, 2, 7; CONTINUANCE, 1; CRIMINAL LAW, 9; DISTRICT MAGISTRATES, 1, 2, 3; TRIAL, 9, 15; TRUSTS, 5; WILLS, 8.

## JUDGMENTS.

1. *Default—reopening.*

The general rule is that applications to open defaults are addressed to the sound discretion of the trial court and such discretion will not be disturbed except in case of clear abuse thereof. *Beall v. Beall*, 29, 33.

2. *Of foreign court.*

Judgments recovered in one state when proved in the courts of another, differ from judgments recovered in a foreign country in no other respect than in not being re-examinable on their merits nor impeachable for fraud if rendered by a court having jurisdiction of the cause and of the parties. *Peterson v. Peterson*, 239, 245.

3. *Full faith and credit clause—judgment of sister state.*

Under the full faith and credit clause of the Federal Constitution a duly authenticated judgment of a court of a sister State, exercising its jurisdiction as a common law court, and presented in a court of this Territory, would carry with it the assumption that the court of the forum rendering the judgment not only had jurisdiction of the subject-matter of the suit but of the parties thereto and it would not be incumbent upon one who bases a right of action upon such a judgment to aver facts essential to the existence of jurisdiction. *Peterson v. Peterson*, 239, 245.

4. *Jurisdiction of court—presumption.*

It is an established rule that where a court of general jurisdiction has special and statutory powers conferred upon it which are wholly derived from statute and not exercised according to the course of common law or are not a part of its general jurisdiction, it is to be regarded *quoad hoc* an inferior or limited

## JUDGMENTS—Continued.

court and its judgment to be treated accordingly, that is, its jurisdiction must appear upon the record and cannot be presumed. *Peterson v. Peterson*, 239, 245.

5. *Action on—pleading.*

This being true no presumption of jurisdiction obtains in such proceedings in any court of any of the States of the Union and all courts exercising jurisdiction in any such case must be taken and held to be courts of inferior or limited jurisdiction and in pleading such a judgment of another court it is necessary to aver in appropriate language its jurisdiction over the parties and the subject-matter of the suit. *Peterson v. Peterson*, 239.

6. *Action on—pleading.*

In an action on a judgment recovered in another State, the record of which is duly authenticated and produced in evidence, it will be presumed that the court had jurisdiction of the subject-matter and the parties in the absence of proof to the contrary but this rule does not apply where the jurisdiction was wholly dependent upon statute or the form of the proceedings unknown to the common law. *Peterson v. Peterson*, 239, 246.

7. *Default.*

The determination or sentence by a court debarring the defendant from the right to answer is in the eyes of the law a judgment and is so recognized by section 2363 R. L. 1915. *Bobkoff v. Chesticoff*, 447, 449.

8. *Power of court to set aside after term.*

The rule that a court cannot set aside or alter a final judgment after the expiration of the term at which it was entered is modified by statute (sec. 2442 R. L. 1915) to the extent that it may set aside its judgment provided a motion for a new trial is filed within ten days without regard to whether that period ends before or after the expiration of the term. *Hollona v. Kamai*, 638, 640.

See also ACTION, 1, 2; APPEAL AND ERROR, 30, 39; BASTARDS, 2; COURTS, 9; DIVORCE, 1, 2; TAXATION, 1, 11; TORTS, 1, 2; TRIAL, 6.

## JURISDICTION.

SEE BOUNDARIES, 2; COMMERCE, 2; COURTS, 3, 4, 5; DISTRICT MAGISTRATS, 2, 3; EQUITY, 3, 5, 11.

## JURY.

1. *Challenge to array—trial and determination.*

If the facts alleged in the challenge to array of jurors are sufficient, if true, to sustain the challenge, the court proceeds to try the truth of the facts alleged, but if the facts alleged present no legal grounds of objection to the jury they may be summarily overruled. *County of Maui v. do Rego*, 608, 612.

## JURY—Continued.

2. *Statute regarding jury commissioners.*

A statute which provides that jury commissioners, among other qualifications, shall be of opposite politics held to be mandatory and a challenge to an array of jurors drawn by commissioners alleged to belong to the same political party to be sufficient, if true, to invalidate the jury. *County of Maui v. do Rego*, 608, 616.

3. *Disagreement—discharge discretionary with trial court.*

The action of the trial court in discharging a jury and declaring a mistrial will not be reviewed by this court except on a clear showing of abuse of the discretion with which the judge is vested. *Territory v. Cabrinha*, 757, 763.

4. *Demand for jury contained in prayer of complaint held insufficient.*

Including in the prayer of the complaint the statutory form of prayer for process that the defendant be cited to "appear and answer this complaint before a jury of this country" does not constitute such demand for a jury trial as is contemplated by the statute. *Trust Co. v. Cabrinha*, 777, 781.

5. *Effect of demand for trial by.*

The filing of a demand for a jury trial by either of the parties within the time prescribed by the statute fixes the status of the case as one to be tried by a jury. *Trust Co. v. Cabrinha*, 777, 781.

6. *Time within which demand for trial by jury may be made.*

A statute which provides that written demand must be filed "within ten days after the case is at issue" fixes the last day upon which a demand may be filed but does not require the case to be at issue before the demand may be filed. *Trust Co. v. Cabrinha*, 777, 782.

7. *Waiver of jury by parties.*

The filing of a demand for a jury trial by one of the parties fixes the status of the case as one to be tried by a jury and this status cannot be changed except by agreement of the parties or by conduct amounting to a waiver of their right to a jury trial. *Trust Co. v. Cabrinha*, 777, 781.

See also NEW TRIAL, 1, 2, 3; TRIAL, 7.

## LACHES.

See EQUITY, 14.

## LAND COURT.

See APPEAL AND ERROR, 25, 42; COURTS, 5, 6.

## LANDLORD AND TENANT.

1. *Summary possession.*

Where a lease provides that the lessor may at any time with-

## LANDLORD AND TENANT—Continued.

draw all or any part of the demised premises for certain enumerated purposes, the refusal, after notice, of the lessee to part with the possession of the premises required by the lessor for one of the purposes specified in the lease constitutes a breach of a condition of the lease and works a forfeiture thereof, and the lessor may proceed under the authority of chapter 154 R. L. to regain possession of the premises by summary proceeding. *Territory v. Correa*, 165.

2. *Summary possession—jurisdiction of district magistrates.*

In a summary proceeding plaintiff alleged a wrongful withholding by defendant after the termination of an alleged tenancy; defendant filed his affidavit by way of answer or plea to the jurisdiction denying the tenancy alleged and claimed ownership and right of possession by virtue of purchase from plaintiff: Held, that the title to real estate was involved and that the cause should have been dismissed for want of jurisdiction. *Yanagi v. Oka*, 176.

3. *Rescission of lease—damages.*

Where a member of a hui claims a specific portion of the hui lands and leases the same to the plaintiff who is unable to get possession of the demised lands by reason of the fact that other parties are in possession and holding under the lessor the plaintiff may rescind the lease and recover damages sustained by reason of failure to obtain possession. *Scott v. Pilipo*, 382, 385. See also EQUITY, 10; HUIS, 2.

## LIENS.

See MECHANIC'S LIENS.

## LIFE ESTATES.

1. *Creation.*

Life estates may be created either by express words or by implication. *Levy v. Lowell*, 716, 720.

## LIMITATION OF ACTIONS.

1. *Part payment as evidence of new promise.*

In an action on a promissory note which on its face was barred by the statute of limitations, there appeared an endorsement showing that \$450 had been paid by the check of a stranger to the note and no showing was made that he was requested by either of the makers of the note to make the payment or that he was their agent authorized for that purpose, held: That in order for this payment to have the effect of a new promise it was incumbent upon the plaintiff to show that the one making the payment did so at the request of the debtor or that he was the agent of the debtor fully authorized for that purpose. *Maciel v. Kalua*, 216, 221.



## LIMITATION OF ACTIONS—Continued.

2. *New promise—time when made.*

The plaintiff having shown by the note itself that more than six years elapsed between the date on which the note matured and the commencement of action thereon where he relies upon a new promise to take the case out of the statute, the new promise must be shown to have been made within six years of the commencement of the action, otherwise the new promise will itself be barred. *Maciel v. Kalua*, 216, 221.

3. *Evidence of new promise.*

Where the debtor stated to the creditor in effect, I am fighting the case against the estate and expect to win out, and then I expect to pay you in full, held: This is not an unconditional promise to pay and is not sufficient to take the case out of the statute. *Maciel v. Kalua*, 216, 223.

4. *Cause of action arising in foreign country or state.*

A territorial statute providing that actions for the recovery of any debt founded upon contract, obligation or liability, where the cause of action arose in any foreign country, shall be commenced within four years after the cause of action accrued, held: The State of Colorado is a foreign country within the contemplation and meaning of the foregoing statute. *Hendrie v. Pedrick*, 258, 262.

See also ADVERSE POSSESSION, 1, 2, 7, 8; MUNICIPAL CORPORATIONS, 5, 9.

## MANDAMUS.

1. *Right of citizen to be registered.*

A citizen of the United States who has resided in the City and County of Honolulu for more than one year next preceding his application to be enrolled in the great register of such municipality as a voter has the right to such registration and when such right is denied him by the officer whose duty it is to register him he is entitled to a writ of mandamus to enforce such right. *In re Sanchez*, 21.

See also APPEAL AND ERROR, 4; ELECTIONS, 1.

## MANSLAUGHTER.

See HOMICIDE, 1, 2.

## MARRIAGE.

See HUSBAND AND WIFE.

## MARRIED WOMEN.

See HUSBAND AND WIFE, 4.

## MASTER AND SERVANT.

1. *Damages—scope of work.*

Where a servant undertakes in the course of his employment,

**MASTER AND SERVANT—Continued.**

during the proper hours therefor and in the proper place, to do something in the furtherance of his master's business and meets with accidental injury therein, the trial court's findings that the accident arose out of and in the course of the employment should not be disturbed unless it is clear that the ordinary servant, in the same situation, would have no reasonable justification for believing that what he undertook to do when injured was within the scope of his implied duties. *Silva v. Kaiwiki Mill Co.*, 324, 330.

See also CONSTITUTIONAL LAW, 1, 2, 3; WORKMEN'S COMPENSATION ACT.

**MECHANICS' LIENS.****1. Demand on owner—waiver.**

In order to enable a material-man to maintain a proceeding for the enforcement of a lien he is obliged to prove that he made demand upon the owner for the amount claimed after giving notice of the claim of lien and before commencing the proceeding to enforce it. The owner does not waive such demand by failing to demur to the complaint for lack of an allegation of demand, and filing an answer of general denial. *Lewers & Cooke. v. Wong Wong*, 39, 44.

**2. When attached.**

A mechanic's lien comes into existence at the time notice of the claim of lien is filed in the proper clerk's office and does not relate back to the time when the labor or materials were furnished. *Hoffschlaeger Co. v. Jones*, 74.

**3. Sufficiency of notice.**

A notice of lien for labor and material used in constructing a building, filed with the contractor, sufficiently describes the material and labor when a lump sum agreed to be paid the contractor by the contracting owner is stated although no itemized statement of the labor and material is embodied in the notice or in a bill of particulars attached to the notice, the notice otherwise sufficiently stating other matters necessary to a clear understanding of the nature and amount of the lien claimed. *Wong Wong v. Skating Rink*, 181, 190.

**4. building required by lease—agency.**

Where a lease requires the construction of a certain building by the lessee upon demised premises, which building becomes the property of the lessor, its construction is a mutual or joint enterprise, the lease and contract for constructing the building are correlated and the lessee is the agent of the lessor for the purpose of constructing the building to the extent of charging the property with a mechanic's lien for labor and materials fur-

**MECHANICS' LIENS—Continued.**

nished and used in the construction of such building. *Wong Wong v. Skating Rink*, 181, 189.

5. *Building required by lease—demand.*

Where the owner of demised property requires his lessee to construct a certain building thereon the lessee is the agent of the owner and after filing notice of a mechanic's lien for labor and material used in the building demand is made upon such agent but not upon the owner such demand is sufficient. *Wong Wong v. Skating Rink*, 181, 192.

See also DISTRICT MAGISTRATES, 2.

**MONOPOLIES.**

See STATES, 2.

**MISTAKE.**

See DEEDS, 5; EQUITY, 3, 4.

**MORTGAGES.**

1. *Necessary parties on foreclosure.*

Where a mortgage contains a stipulation that the mortgagor may sell the mortgaged property in parcels, the mortgagee to receive and apply on the mortgage indebtedness certain portions of the proceeds of the sales and a second mortgage is given on the same property in which it is stipulated that the mortgagor may sell in parcels and all of the proceeds of sales not applicable to the prior mortgage indebtedness, the mortgagee in the prior mortgage is a necessary party to a suit to foreclose the latter mortgage, especially when it is alleged in the answer of the mortgagor that sales had been made the proceeds of which over and above the amounts applicable to the senior mortgage indebtedness were sufficient to satisfy the junior mortgage indebtedness and that the junior mortgagee had, without the consent of the mortgagor, permitted the senior mortgagee to retain all of the proceeds of such sales, as under such circumstances the mortgagees in both mortgages are legally and beneficially interested in the subject matter of the suit, and the mortgagor has the right to have the application of the payments determined. *Waterhouse v. Achi*, 431, 435.

**MUNICIPAL CORPORATIONS.**

1. *Powers—waiver.*

While municipal or governmental corporations are held to a strict exercise of their powers it has been held that they may waive the terms of their written contracts and be estopped thereby. *Silverhorn v. Ins. Co.*, 366, 373.

2. *Eminent domain.*

The exercise of the power of assessment for the improvement of an existing street is by virtue of the taxing power and not of

## MUNICIPAL CORPORATIONS—Continued.

the law of eminent domain. *McCandless v. City and County*, 524, 531.

3. *Eminent domain—constitutional law.*

The right to take private property for taxes is distinguished from the eminent domain and is not repugnant to the Fifth Amendment of the Federal Constitution. *McCandless v. City and County*, 524, 533.

4. *Frontage tax—protests.*

The word "owners" in section 1795 R. L. 1915, providing that owners might protest against local improvements, held not to include tenants or lessees prior to the passage of Act 239 Session Laws 1917. *McCandless v. City and County*, 524, 534.

5. *Frontage tax—limitation of actions.*

The thirty-day limitation within which actions or proceedings to review, question or enjoin the enforcement of a local improvement ordinance shall be brought commences to run from the last day of the publication of the assessment ordinance. *McCandless v. City and County*, 524, 535.

6. *Improvement statutes—"due process."*

An assessment for local improvement based upon frontage is not in conflict with the "due process of law" clause of the Constitution. *McCandless v. City and County*, 524, 533.

7. *Taxation—due process.*

A party is not deprived of his property without due process of law by the enforced collection of taxes merely because they, in individual cases, impose unequal burdens. *McCandless v. City and County*, 524, 533.

8. *Frontage tax.*

An ordinance providing that all the lots abutting upon the portion of the street to be improved shall be assessed in proportion as the frontage of each lot is to the frontage of all the lots in the district, does not contravene the law that assessments for local public improvement shall be in proportion to the benefit. *McCandless v. City and County*, 524, 533.

9. *Frontage tax—limitation of actions.*

The legislature has power to prescribe the time within which actions or proceedings at law or in equity to review, question the validity or enjoin the enforcement of any improvement ordinance shall be instituted. *McCandless v. City and County*, 524, 535.

See also COUNTIES.

## MURDER.

See HOMICIDE, 3, 4, 5.

## MUTUAL BENEFIT SOCIETIES.

See ARBITRATION AND AWARD; BENEFICIAL ASSOCIATIONS.

## NEGLIGENCE.

1. *Proximate cause—question for court or jury.*

Where the facts are undisputed and but one reasonable inference can be drawn therefrom it is the duty of the court to pass on questions of negligence, contributory negligence and proximate cause as questions of law. *Ferrage v. Hon. R. T. & L. Co.*, 87, 91.

2. *Automobiles—duty of driver at street corners.*

The duty to observe ordinary care requires that the driver of an automobile must anticipate the possibility of meeting pedestrians or other vehicles at street crossings and have his machine under such control as may be necessary to avoid collision. The mere sounding of a horn is not a sufficient precaution when the circumstances demand that speed be slackened or the machine be stopped. *Ferrage v. Hon. R. T. & L. Co.*, 87, 91.

3. *Contributory negligence—last clear chance.*

Where the evidence shows negligence on the part of both plaintiff and defendant, in order that the rule of "the last clear chance" may be applied, the plaintiff either must have been in actual peril and unable to extricate himself, or in immediate danger of getting into peril to the knowledge of the defendant, and there must have been a reasonable opportunity thereafter for the defendant to have averted injury, otherwise, the negligence of plaintiff and defendant being concurrent at the time of the injury, the plaintiff's negligence is to be regarded as a proximate cause of the injury, and the plaintiff cannot recover. *Ferrage v. Hon. R. T. & L. Co.*, 87, 93.

3. *Contributory negligence—wilful injury.*

The rule that contributory negligence of the plaintiff does not preclude the recovery of damages where the injury was caused by the wilful act of the defendant has no application in a case where the gravamen of the plaintiff's complaint was negligence—not wilfulness—and the case was tried on the theory of negligence on the part of the defendant. *Ferrage v. Hon. R. T. & L. Co.*, 87, 94.

See also CANCELLATION OF INSTRUMENTS, 2, 3.

## NEW TRIAL.

1. *Tampering with jury.*

If the successful party is shown to have tampered with a juror the verdict in his favor should be set aside so as to remove

**NEW TRIAL—Continued.**

the court's proceedings from suspicion of undue influence and as punishment for wrong-doing. *Dwight v. Ichiyama*, 193.

**2. Approaching juror.**

It is proper to deny a motion for new trial based upon the ground that a stranger who is not shown to have acted by procurement or with the knowledge or consent of any party to the action approached one of the jurors with the request that he find for the defendant in the absence of a showing that the verdict rendered was not authorized by the evidence and the law of the case and no showing made that the jury or any one of the jurors were influenced by such request. *Dwight v. Ichiyama*, 193.

**3. Approaching jury—waiver.**

In a case where there were three defendants, after the jury had been instructed and retired to consider of their verdict they reported to the court that one juror had been approached by a stranger and requested to find for the defendant; two of the defendants thereupon moved that the jury be discharged and a mistrial entered, which motion was denied; plaintiff did not join in the motion nor object to the ruling of the court; the jury returned a verdict against one defendant but in favor of the two defendants asking the discharge of the jury; later plaintiff moved for a new trial on the sole ground that a juror had been approached and asked to find for the defendant; Held, that the motion for new trial was properly denied; that plaintiff by his silence and inaction had waived the irregularity of which he complained. *Dwight v. Ichiyama*, 193.

**4. Excessive damages.**

A motion for a new trial on the ground that the verdict for \$1000 damages is excessive is properly denied under the facts which the evidence in this case tends to prove, there being no showing or circumstance disclosed by the record to the effect that the verdict of the jury was the result of passion or prejudice. *Machado v. Mitamura*, 224, 228.

**5. Non-suit—directed verdict.**

In an action to recover damages by reason of alleged negligence the evidence was conflicting to the extent that the jury would have been authorized to have found a verdict for either party motion for non-suit and a motion for an instructed verdict were both properly denied, and a motion for a new trial should have been denied. *Machado v. Mitamura*, 224, 229.

**6. When should be granted.**

If the verdict is so manifestly against the evidence as to induce the conviction that a mistake has been made or that injustice has been done, or where it appears that the verdict is

**NEW TRIAL—Continued.**

clearly, palpably, decidedly and strongly against the evidence or is manifestly the result of bias or misunderstanding on the part of the jury the verdict should be set aside. *Ter. v. Nish*, 677, 678.

**NEXT FRIEND.**

See HUSBAND AND WIFE, 4; INSANE PERSONS, 1; PARTIES, 2.

**NOTICE.**

Of appeal. See APPEAL AND ERROR, 21, 28, 29; see also MECHANIC'S LIENS, 3; CONSTITUTIONAL LAW, 2.

**OFFICERS.**

1. *District magistrates—damages.*

In a case where it does not appear that the magistrate attempted to assume jurisdiction where none existed he cannot be required to respond to damages for his acts. *Akatsuka v. McKay*, 600. See also CONTRACTS, 1, 2; INDICTMENT AND INFORMATION, 5.

**PAROLE.**

See CRIMINAL LAW, 2.

**PARTIES.**

1. *Who are necessary.*

It is well settled in this jurisdiction that all parties interested in the subject-matter of a suit in equity are necessary parties to the suit. *Waterhouse v. Achi*, 431, 435.

2. *Suit by next friend.*

Where a suit is brought by a *prochein ami* or next friend the petition or declaration should show upon its face that the plaintiff is laboring under some legal disability which prevents him from instituting and managing the suit himself. *Nawahie v. Peterson*, 558, 562.

See also APPEAL AND ERROR, 19, 32, 51; HUSBAND AND WIFE, 4; MORTGAGES, 1; TORTS, 2.

**PARTITION.**

See DEEDS, 16.

**PARTNERSHIP.**

See INDICTMENT AND INFORMATION, 5.

**PATENTS.**

1. *Right of purchase from patentee.*

Where the manufacturer of an article protected by letters patent chooses himself to vend it, a purchaser can use the article in any part of the United States, and, unless restricted by con-

**PATENTS—Continued.**

tract with the patentee, can sell and dispose of the same. *West v. County of Hawaii*, 310, 316.

**PAYMENT.****1. Application of—open account.**

An open continuous account is generally regarded as one debt for the unpaid balance, and general credits will ordinarily be applied against the earliest debts, but where a material-man keeps a continuous account with a contractor in which entries are made in connection with certain specified jobs of the contractor a credit entry which designates a particular job is evidence of an intention on the part of the creditor to apply the payment to the bill for material furnished for that job, and though it may fall short of a legal application because the debtor was not notified of it, the court in making the application will follow that intent especially as it appears to be fair and equitable. *Lewers & Cooke v. Wong Wong*, 39, 45.

**PHYSICIANS AND SURGEONS.**

See NEW TRIAL, 4. 5.

**PLEADING.****1. Effect of evidence on nature of action.**

Where the complaint sets up a case of damages for assault and battery and the defendant answers by general denial, but defendant, a police officer, offers evidence tending to justify his action on the ground that such violence as he used was necessary in arresting plaintiff for a penal offense committed in his presence and plaintiff offers evidence tending to show that no offense had in fact been committed and that more force than was reasonably necessary to effect an arrest was used, held, that this did not change the case to one for false imprisonment. *Leong Sam v. Kelihoomalu*, 477.

See also CORPORATIONS, 1; DISTRICT MAGISTRATES, 1; EJECTMENT, 1; FRAUD, 2, 3; JUDGMENT, 5, 6; PROCESS, 1; TRIAL, 3; WORKMEN'S COMPENSATION ACT, 7.

**POLICE.**

See ASSAULT AND BATTERY, 2; PLEADING, 1.

**POLICE POWER.**

See CONSTITUTIONAL LAW, 4; STATES, 3.

**PLEDGES.**

See BROKERS, 2.

**PRINCIPAL AND AGENT.****1. Power of agent.**

Where R, under authority of a general power of attorney, exe-



## PRINCIPAL AND AGENT—Continued.

cuted a lease of a lot of land owned by B, his principal, the lease being in the individual name of R and the lessee not having knowledge that R was not the owner of the property or that he was acting for a person other than himself: Held, that the lease was binding upon B, the principal. *Barnes v. De Fries*, 401.

2. *Actions against principal.*

The contract of the agent is the contract of the principal and he may sue or be sued thereon though not named therein. *Barnes v. De Fries*, 401.

3. *Parole evidence rule.*

Notwithstanding the rule of law that an agreement reduced to writing may not be contradicted or varied by parol it is well settled that the principal may show that the agent who made the contract in his own name was acting for him. This proof does not contradict the writing, it only explains the transaction. *Barnes v. De Fries*, 401, 402.

See also APPEAL AND ERROR, 35; DAMAGES, 1; MECHANIC'S LIENS, 4.

## PROBATE PROCEEDINGS.

See COURTS, 2.

## PROCESS.

1. *Prayer for in complaint—district courts.*

A prayer that process issue, while proper, is not necessarily a part of the complaint in a case in the district court, and the absence of such prayer is not ground for demurrer. *Wong Young v. Kum Chong*, 95.

2. *Office of summons.*

The office of a summons is to bring the defendant into court so that the court may have jurisdiction over his person and its object is accomplished when the defendant comes in without objection and submit himself to the jurisdiction of the court. *Wong Young v. Kum Chong*, 95, 96.

## PROHIBITION.

1. *Contempt—summary proceedings.*

The rule that the writ of prohibition will not be granted unless the question of jurisdiction has been unsuccessfully raised in the lower court does not apply to summary proceedings of a quasi criminal nature such as proceedings for contempt. *Reynolds v. Reynolds*, 510, 513.

## PUBLIC UTILITIES COMMISSION.

See COMMERCE, 3.

**PROXIMATE CAUSE.**

See NEGLIGENCE, 1.

**QUANTUM MERUIT.**

See CONTRACTS, 2.

**QUO WARRANTO.**

1. *Courts—authority.*

Where on a quo warranto the court or judge has authority "to direct the corporation to proceed to a new appointment" to fill a vacancy existing in the board of trustees of the corporation the court or judge likewise possesses the authority to require an election to be held by the members of the society for that purpose and generally to supervise and govern that election. *Chinese Society v. Yee Yap*, 377, 380.

**RAPE.**

1. *Resistance by woman.*

In the absence of threats or other things which make resistance impossible there must be not only an entire absence of mental consent but there must be the most vehement exercise of every physical means or faculty within the woman's power to resist. *Ter. v. Nishi*, 677, 681.

2. *Instructions.*

Where there was no evidence that the ability of the prosecuting witness to resist was overcome by reason of unconsciousness, threats or otherwise, it is held to be error for the court to refuse to instruct the jury that in order to convict they must find that the prosecuting witness "did everything she could under the circumstances to prevent the defendant from accomplishing his purpose. If she did not do that it is not rape." *Ter. v. Nishi*, 677.

3. *Evidence of complaint—probative effect.*

The effect of evidence that a complaint was promptly made by the prosecuting witness is to affect favorably the credibility of such witness and not to corroborate the testimony given at the trial. *Territory v. Schilling* 17 H. 249, overruled. *Ter. v. Nishi*, 677, 684.

**RECORDS.**

See COURTS, 10.

**REMAINDERS.**

1. *Definition.*

An estate in remainder, recognized here as well as at common law, is defined as an estate limited to take effect and be enjoyed after another estate has terminated; a contingent remainder is where the estate in remainder is limited to take effect either to

**REMAINDERS—Continued.**

a dubious and uncertain person or upon a dubious and uncertain event. *Kahaulelio v. Ihihi*, 292, 295.

**RES ADJUDICATA.**

See TRIAL, 6.

**RULES.**

See COURTS, 11, 12; STIPULATIONS, 1.

**SALES.**

See CONTRACTS, 4, 5, 6, 7, 8, 9.

**SCHOOLS.**

1. *Status of teacher—contract.*

Where one who has been appointed a school teacher by the department of public instruction enters into a contract with the Territory to serve as such teacher for a specified time, the department is under no legal obligation to reappoint him at the expiration of the contract, or to assign a reason for not reappointing him, or to give him a hearing in connection with its decision not to reappoint him. *Brown v. Kinney*, 124.

2. *Punishment of pupils—malice.*

It is not necessary for the prosecution to prove malice on the part of the teacher where the punishment inflicted is clearly unnecessary or unreasonable but such malice will be inferred from the fact that unnecessary or unreasonable punishment was inflicted. *Ter. v. Cox*, 461, 465.

3. *Corporal punishment—prosecution for.*

The teacher is not liable to criminal prosecution for assault where the punishment is not clearly unreasonable unless it appears that he bore malice against the pupil and whipped the latter to gratify his malice, ill will or grudge or for the purpose of being revenged on him. *Ter. v. Cox*, 461, 465.

4. *Teachers—corporal punishment.*

A school teacher has the right to inflict reasonable corporal punishment upon his pupil for such misbehavior as has a direct and immediate tendency to injure the school or to subvert the master's authority but in so doing the master must exercise sound discretion and judgment and adapt the punishment to the nature of the offense and the character of the pupil. *Ter. v. Cox*, 461, 465.

5. *Punishment must be reasonable.*

The law does not license the teacher to inflict corporal punishment at will, but, in the words of section 270 R. L. 1915, which is substantially the common law rule, the punishment must be necessary and reasonable. *Ter. v. Cox*, 461, 463.

## SEDUCTION.

1. *Promise of marriage—corroboration.*

In a prosecution for the offense of seduction under section 3902 R. L. 1915 the testimony of the female of the promise of marriage, alleged to have been made to her by the defendant prior to the sexual act, must be corroborated by evidence either direct or circumstantial. *Ter. v. Fernandez*, 617.

2. *Promise of marriage—presumption.*

The testimony of the prosecutrix to the effect that just prior to the act of sexual intercourse on the 5th day of May, 1917, the defendant had promised to marry her is not corroborated by other evidence that in July, 1917, the defendant declared his intention to be married the following Christmas. Presumptions do not run backward; they are not retroactive. *Ter. v. Fernandez*, 617.

## SEPARATE MAINTENANCE.

See HUSBAND AND WIFE, 2, 3.

## SET-OFF AND COUNTERCLAIM.

1. *Control of action.*

Under Sec. 2392 R. L. 1915 a set-off and counterclaim is not only a defense by deduction, but is itself an action, and while the plaintiff may control his own action, and discontinue the same, he cannot control, nor discontinue, defendant's cause of action upon the set-off and counterclaim. *Parson v. Schuman Car. Co.*, 393.

See also ABATEMENT AND REVIVAL, 1.

## SHERIFFS AND CONSTABLES.

See ASSAULT AND BATTERY, 2.

## SOLDIERS.

See ELECTIONS, 2.

## SPECIFIC PERFORMANCE.

1. *Sale of chattels.*

Equity will not in general decree the specific performance of contracts concerning chattels because their money value recovered as damages will enable the party to purchase others in the market of like kind and quality. *Lum Wai v. Hong Hoon*, 696, 700. *Hawaiian Pineapple Co. v. Saito*, 787, 792.

2. *Sale of chattels.*

Where particular chattels have some special value to the owner, above any pecuniary estimate, and where they are unique, rare and incapable of being reproduced by money damages equity will decree a specific delivery of them to their owner and the

## SPECIFIC PERFORMANCE—Continued.

specific performance of contracts concerning them. *Lum Wai v. Hong Hoon*, 696, 700.

3. *Chattels of special kind.*

Where chattels are such that they are not obtainable in the market or can only be obtained at great expense and inconvenience, and failure to obtain them causes a loss which could not be adequately compensated in an action at law a court of equity will decree specific performance. *Lum Wai v. Hong Hoon*, 696, 701. *Hawaiian Pineapple Co. v. Saito*, 787, 792.

## STATES.

1. *Their relationship.*

While the several States of the Union have no independent political existence in an international sense, they sustain toward each other, except as limited by the Federal Constitution, a strictly foreign relation. *Hendrie v. Pedrick*, 258, 260.

2. *Authority to control private property.*

The states and territories may regulate common carriers, innkeepers, warehousemen, etc., whenever they enjoy extraordinary legal privileges or constitute a monopoly. *Ter. v. McCandless*, 485, 493.

3. *Police power.*

The police power is broad in its scope but it is subject to the just limitation that it extends only to such measures as are reasonable in their application and which tend in some appreciable degree to promote, protect or conserve the public health, morals or safety or the general welfare. *Ter. v. McCandless*, 485, 497.

See also JUDGMENT, 2, 3, 5, 6; LIMITATION OF ACTIONS, 4; WAR, 1.

## STATUTES.

1. *Construction—presumptions.*

Courts will not presume an oversight on the part of the legislature in the enactment of an amendatory statute where such presumption is avoidable. *Hamano v. Miyake*, 12, 14.

2. *Amendment—effect.*

When a statute is amended "to read as follows," those parts which are omitted are repealed and new provisions take effect at the time the statute as amended becomes operative. (*Following Weinzheimer v. Lufkin*, 22 H. 183). *Hamano v. Miyake*, 12, 13.

3. *Construction—by courts.*

Courts are at liberty to disregard a legislative construction which, in their judgment, is not a correct exposition of the original act. *Brown v. Kinney*, 124, 135.

## STATUTES—Continued.

4. *Construction on re-enactment.*

Where a statute has been in force for a long period of time and is reenacted the same application and force should be given it that obtained at the time of its original enactment. *Hendrie v. Pedrick*, 258, 262.

5. *Construction—words and phrases.*

Construing a statute which provides that "No expenditure of public money except for . . . or for other purposes which do not admit of competition, where the sum to be expended shall be one thousand dollars or more, shall be made, except under contract let after public advertisement for sealed tenders in the manner provided by law:" Held, not to except from the provision requiring tenders the purchase of motor trucks, which admit of competition. *West v. County of Hawaii*, 310.

6. *Mandatory.*

Mandatory statutes are imperative; they must be strictly pursued; otherwise the proceeding which is taken ostensibly by virtue thereof will be void. *Bobkoff v. Chesticoff*, 447, 450.

7. *Construction of election statutes.*

Statutes which confer or extend the elective franchise should be liberally construed. *Dwight v. Kalauokalani*, 454, 459.

8. *Construction—mandatory provisions.*

A mandatory statute is one, the omission to follow which renders the proceeding to which it relates illegal and void, while a directory provision is one the observance of which is not necessary to the validity of the proceeding. *County of Maui v. do Rego*, 608, 615.

9. *Construction of Workmen's Compensation Act.*

Laws of the nature of the Workmen's Compensation Act should be liberally and broadly construed. *Ching Hon Yet v. See Sang Co.*, 731, 739.

See also INDICTMENT AND INFORMATION, 5; JURY, 2; WORKMEN'S COMPENSATION ACT, 1, 2, 3.

## STIPULATIONS.

1. *Binding force of.*

The responsibility devolving upon this court to require the observance of its rules is secondary to its duty to maintain the integrity of stipulations entered into between counsel and approved by and filed with the court. *First Trust Co. v. Cabrinha*, 655.

## SUMMARY POSSESSION.

See LANDLORD AND TENANT, 1, 2.

**SUMMONS.**

See APPEAL AND ERROR, 10; PROCESS, 2.

**SUNDAY.**

1. *Time—computation.*

In computing the time in which a summons may be made returnable if the last day falls on Sunday the summons may properly be made returnable on Monday, the next legal day. *Peabody v. Paakaua*, 250, 252.

**TAXATION.**

1. *Weight of judgment of tax appeal court.*

The valuation fixed by the tax appeal court should not be disturbed unless good reason appears therefor. *Re Taxes Waiakea Mill Co.*, 333, 341.

2. *Valuations.*

The value of the whole would not be less than the sum of its parts unless the value of the parts was depreciated by reason of their combination. *Re Taxes Waiakea Mill Co.*, 333.

3. *Rules of valuation.*

It is impossible to lay down definite rules for valuing a sugar plantation. Possibilities of disasters and losses, low prices and increased cost of production enter into the estimate of values of such properties, and when those things occur the values are reduced accordingly. *Re Taxes Waiakea Mill Co.*, 333, 338.

4. *Enterprise for profit.*

While the income which a property will produce is not the only thing to be considered in estimating its value as an enterprise for profit this is one of the most potent factors in determining its value. *Re Taxes Waiakea Mill Co.*, 333, 339.

5. *Valuation—mature crop of cane.*

The value of a mature crop of cane for taxation purposes is the amount the sugar it will produce would bring when harvested considering the price of sugar on January 1 of that year less the cost of harvesting, marketing, etc., and of necessity this value can only be approximated. *Re Taxes Waiakea Mill Co.*, 333.

6. *Valuation—enterprise for profit.*

The value of property combined in an enterprise for profit is not less than the aggregate value of the separate items making up the whole unless the value of the items has been depreciated by reason of their combination. *Re Taxes Waiakea Mill Co.*, 333.

7. *Appeal from tax appeal court.*

Where a taxpayer appeals from the decision of the tax appeal court fixing the value of his property at more than his return but at less than the assessment, and the assessor does not ap-

**TAXATION—Continued.**

peal, held: That under these circumstances the valuation fixed by the tax appeal court constitutes the maximum valuation which this court could place upon the property. *In Re Union Mill Co.*, 345, 346.

**8. Appeals.**

A tax appeal occupies about the same position as an equity appeal in this court. Of course, this court can in no case place a valuation outside of the limits fixed by the appeals. *Re Taxes Union Mill Co.*, 345.

**9. Weight of decision of tax appeal court.**

The decision of a tax appeal court in fixing values is presumed to be correct and should not be lightly overturned. *Re Taxes Union Mill Co.*, 345, 348.

**10. Inheritance tax.**

The inheritance tax under the statute is upon the transfer of property in contemplation of death, so that when property is devised to one with a charge that he pay another a monthly sum, the inheritance tax is chargeable against the devisee and not to the annuitant. *Estate of Brown*, 443, 445. *Estate of Brown*, 575.

**11. Decision of tax appeal court.**

The decision of the tax appeal court fixing the value of property will be sustained unless shown to have been erroneous, and the burden of proof is upon the appellant. *Re Taxes Castle*, 598.

See also MUNICIPAL CORPORATIONS, 2, 3, 7.

**TEACHERS.**

See SCHOOLS.

**TELEGRAPHS AND TELEPHONES.****1. Right of telephone company to equitable relief.**

A bill for an injunction filed by a public telephone company which shows, in substance, that the company, in performance of its duty to give good and efficient service, furnishes to its subscribers, for their convenience and information, a directory giving the names and numbers of all its subscribers, and a special directory in the Japanese language for the use of subscribers of Japanese nationality; that the company has endeavored to properly fulfil its duty in the premises, but that such duty cannot be effectively performed unless it has control of the publication and distribution of such directories to the end that their accuracy may be verified; that the respondent has published and is circulating a directory in the Japanese language which is inaccurate and incomplete and contains the names of persons who are not subscribers to the complainant's



**TELEGRAPHS AND TELEPHONES—Continued.**

telephone system, and which causes much trouble and annoyance to the company and its subscribers; and that in publishing the names of non-subscribers who may be reached by calling up certain telephone numbers the respondent causes an increase in the volume of the company's operations and at the same time deprives the company of a certain amount of revenue which it is entitled to receive, states a case entitling the complainant to relief in equity. *Mutual Telephone Co. v. Nippu Jiji*, 156.

**TENANCY IN COMMON.****1. Ejectment—ouster.**

One tenant in common may maintain an action in ejectment against his co-tenant where there has been an actual ouster, or where the co-tenant is in possession of more than his share of the land or is in receipt of more than his share of the rent. *Makainai v. Lalakea*, 268, 273.

**2. Deeds to whole or part of common property.**

Where one tenant in common makes a deed to the whole of the common property the deed conveys only his own interest and does not convey the interests of his cotenants, but where he attempts to convey a specific portion of the common property by metes and bounds to a stranger the deed is voidable at the election of his cotenants and the grantee does not, where there is no avoidance of the deed, become a cotenant so as to enable him to have the specific portion so conveyed set aside to him and only acquires such proportionate interest in the specific part described by metes and bounds as his grantor had, not in the whole, but in this particular portion. *Scott v. Pilipo*, 277, 282.

**3. Lease—accounting.**

Where one cotenant leases a part of the common property for a term of years the lessee becomes a cotenant and is liable to account for rents and profits to the other cotenants. *Scott v. Pilipo*, 277, 283.

**4. Adverse possession.**

The plaintiff, who held the legal title to less than one-half of the land in controversy and which was owned in cotenancy, actually occupied for more than forty years about one-half of the land claiming a one-half interest therein (the other half being occupied by a co-tenant, admitted to be the owner thereof) by such adverse possession and user acquired title to a small interest in the land the title to which otherwise would have been in a third co-tenant who did not during the time claim any interest in the land. *Kaahanui v. Kaohi*, 361.

**TENANCY IN COMMON—Continued.****5. *Adverse possession.***

One cotenant in common may acquire the title of a cotenant by adverse possession where the one ousts the other and claims the title which the other held, all of the necessary elements of adverse possession being present. *Kaahanui v. Kaohi*, 361.

**6. *Accounting between cotenants.***

Where one tenant in common uses and occupies the whole of the common property without excluding his cotenants and without any demand from them for possession, and refused on his part, in the absence of any agreement to pay rent, he is not liable to his cotenants for the use and occupation of the common property. *De Mello v. De Mello*, 675, 676.

**7. *Actions between.***

One tenant in common cannot maintain an action at law against his cotenant in respect of the common property unless he has been disseized or ousted therefrom. *De Mello v. De Mello*, 675. See also HUIS, 1; JOINT TENANCY, 1.

**TERRITORY.**

See JUDGMENTS, 2, 3, 5, 6; LIMITATION OF ACTIONS, 4; STATES, 1, 2, 3; WAR, 1.

**TIME.**

SEE APPEAL and ERROR, 33; SUNDAY, 1.

**TORRENS TITLES.**

See APPEAL AND ERROR, 25, 42; COURTS, 5, 6.

**TORTS.****1. *Judgments—remission of damages.***

Where the decision upon which the judgment in an action of tort is predicated specifically distinguishes and separates the illegal portion of the judgment from that portion which is legal the plaintiff may be permitted to remit the illegal portion of the judgment. *Kealoha v. Halawa Plant.*, 579.

**2. *Liabilities of co-defendants.***

The general rule is that in tort actions the liability of co-defendants is several as well as joint and that a new trial may be granted a part of them and the verdict allowed to stand as to others, but where the judgment up to a certain amount is good as to both the defendants and beyond that amount is invalid as against one of them it follows that the judgment can only be sustained in such an amount as was properly assessable against both defendants. *Kealoha v. Halawa Plant.*, 579, 590.

See also ACTIONS, 2.

## TRANSCRIPT.

See APPEAL AND ERROR, 47.

## TREATIES.

See CITIZENS, 1.

## TRESPASS.

1. *Defense—evidence.*

It is the law in this Territory that under a general denial a defendant in an action of trespass *quare clausum fregit* may as a defense show title in himself or in one under whom he made entry, and this he may do as fully as though he had interposed the common law plea of *liberum tenementum*. *Kealoha v. Hala-wa Plant.*, 579, 584.

See also ACTION, 1, 2; INJUNCTION, 1.

## TRIAL.

1. *Jury waived—decision.*

In the trial of civil cases, where a jury trial has been waived, the court shall hear and determine the case both as to the facts and the law, and its decision shall be rendered in writing stating its reasons therefor. *Waianae Co. v. Kaiwilei*, 1, 5.

2. *Words and phrases.*

The word "trial" as used in Sec. 2270, R. L. 1915, as amended by Act 49, S. L. 1917, means a trial on the merits—the examination of the evidence for the purpose of determining the issues of fact between the parties, and does not include the hearing of an appeal from a district court solely on points of law. *Hamano v. Miyake*, 12, 15.

3. *Pleading—proof—demand—nonsuit.*

Where a demand is a condition precedent to the maintenance of an action the failure to allege it does not dispense with the necessity of proving it at the trial under an answer raising the general issue, and the failure to make such proof may be taken advantage of by motion for nonsuit though the point was not raised by demurrer. *Lewers & Cooke v. Wong Wong*, 39.

4. *Judicial inquiry.*

Upon an inquiry in limine regarding the status of a person alleged to be mentally incompetent a judicial hearing is required and the taking of the evidence of but one witness followed by a refusal on the part of the court to hear any other or further evidence falls short of a judicial inquiry as contemplated by the law. *Nawahie v. Kamalani*, 82, 86.

5. *Offer of proof.*

Some of the exceptions are to rulings of the court in refusing to permit a witness for defendant to answer certain questions. There is no showing by offer of proof or otherwise as to what the

## TRIAL—Continued.

answers to these questions would be. Such exceptions are without merit. *Ter. v. Hart*, 349, 358.

6. *Res adjudicata*.

Where upon appeal to this court it was held that K. A. K., the grantee named in a certain deed, was K. Jr. and not K. Sr., and upon a trial *de novo* no evidence being introduced contrary to the above facts so found the identity of K. A. K. as K. Jr. became *res adjudicata*. *Okamura v. Kaulani*, 406.

7. *Province of jury*.

It is the exclusive province of the jury to determine all questions of fact in the case. Hence an instruction which takes from the jury a matter within its exclusive province, as for instance the degree of guilt of the accused, amounts to an invasion and is erroneous. *Ter. v. Kaeha*, 467, 471.

8. *Leading questions*.

It is not a valid objection that the court in examining a witness has asked a leading question. Since the court may in its discretion allow leading questions it may in the proper exercise of its right to ask questions also ask leading questions. *Ter. v. Kekipi*, 500, 504.

9. *Right of judge to ask questions*.

The trial judge should never assume the duties of counsel, but if at any time he becomes convinced that the witness has misunderstood the questions propounded by either counsel and as a result of such misunderstanding the import of his testimony is in doubt it is not only his privilege but his duty to ask such questions of the witness as are necessary to remove such doubt and fully develop the truth in the case. *Ter. v. Kekipi*, 500, 504.

10. *Objections—motion to strike testimony*.

One cannot take his chances of advantage by not objecting to questions which clearly call for improper evidence and if disappointed in the answer then move to strike out the testimony. *Ter. v. Kekipi*, 500, 502.

11. *Instructions*.

A requested instruction not applicable to the facts of the case is properly refused. *Re Ah Sim*, 591, 595.

12. *Instructions*.

A requested instruction which has been covered by other instructions given in the case is properly refused. *Re Ah Sam*, 591, 596.

13. *Prima facie case*.

Where plaintiffs made out a *prima facie* case and the defendants offered no evidence and made no effort to controvert the evidence

## TRIAL—Continued.

of the plaintiffs the verdict should be for plaintiffs. *Holiona v. Kamai*, 638.

14. *Jury waived—contents of decision.*

Where the court, trial by jury being waived, in considering evidence adduced refers to certain discrepancies between the description of land contained in a deed (not in evidence) and in the complaint, but it appearing that the reference to the discrepancies was a mere cursory remark and that the court in arriving at its decision did not take the deed into consideration, such reference to the discrepancies mentioned is not prejudicial error. *Whitford v. Kahananui*, 667.

15. *Judge's right to call witnesses.*

A judge may call witnesses to supplement the evidence produced by the parties when he believes this necessary. *Kamahalo v. Coelho*, 689.

16. *Impeachment of defendant.*

A defendant who takes the stand and testifies in his own behalf is subject to be discredited or impeached by any method allowed in the case of other witnesses in that jurisdiction. *Ter. v. Goo Wan Hoy*, 741, 743.

17. *Evidence—order of proof.*

The order of proof is a matter largely within the discretion of the trial court. Especially is this true in a prosecution for conspiracy where the facts are ordinarily complicated and involved. *Ter. v. Belliveau*, 768, 772.

See also JURY, 3, 4, 6, 7; WITNESSES, 1, 2, 3.

## TRUSTS.

1. *Compensation of trustees.*

Trustees are to be allowed the same fees which are allowed by statute to executors, administrators and guardians. *Estate of Ena*, 414, 416.

2. *Extra compensation for special services.*

Where the trustee has rendered services to the estate which are professional in character and are outside of the duties usually required of it extra compensation should be allowed. *Estate of Ena*, 414, 416.

3. *Extra compensation—rules.*

Each claim for special or professional services rendered by a trustee to the trust estate must stand upon its own merits. It must appear that the services were for the sole benefit of the estate and the claim for compensation must be reasonable. *Estate of Ena*, 414, 418.

## TRUSTS—Continued.

4. *Trustee—fees as broker.*

Where the trustee of an estate who is a stock broker and who as such sells stocks and bonds of the trust estate in order to liquidate the outstanding indebtedness of the estate and the sale is approved by the court the trustee is entitled to reasonable compensation for the services rendered in addition to the statutory compensation prescribed for routine services. *Estate of Ena*, 414.

5. *Appointment of trustees.*

The will of C, dated in 1889 and probated in 1891, named two trustees to execute the trust created and provided that whenever the beneficiaries of the trust or a majority of them shall apply to a justice of the supreme court a third trustee shall be appointed. Held, that by the Judiciary Act of 1892 all original equity jurisdiction having been taken from the several justices of the supreme court and reposed in the circuit judges of the islands, the power to appoint a third trustee is now exercisable by a circuit judge and not by a justice of the supreme court. *Estate of Carter*, 536.

6. *Expenses—attorney's fee.*

H by deed of trust conveyed his property to L as trustee reserving to himself the income from the estate less expenses necessarily incurred in the conduct and management of the trust estate. A vacancy in the trusteeship occurred. Held that an attorney's fee for services rendered in securing the appointment of a new trustee should be paid out of the income and not out of the corpus of the estate. *In re Hobron*, 753.

## VENDOR AND PURCHASER.

1. *Forfeiture—waiver.*

The clause in a contract of sale of real estate reserving to the vendor the right to declare a forfeiture for failure of the vendee to make payments as agreed may be waived but it is a general rule that mere indulgence or silence will not be construed as a waiver unless some element of estoppel can be invoked. *Trust Co. v. Cabrinha*, 777, 784.

2. *Forfeiture—waiver.*

To constitute a waiver otherwise than by express agreement there must be unequivocal acts or conduct of the vendor evincing the intent to waive. *Trust Co. v. Cabrinha*, 777, 785.

3. *Forfeiture—waiver.*

In the absence of other circumstances the acceptance by the vendor of payments past due does not relieve the vendee from his obligation to make subsequent payments promptly, nor will it operate to estop the vendor from declaring a forfeiture for failure to make subsequent payments. *Trust Co. v. Cabrinha*, 777, 785.

## VERDICT, DIRECTED.

See APPEAL AND ERROR, 15.

## WAIVER.

1. *Definition.*

A waiver is defined as the failure to insist upon some right, claim or privilege and of foregoing or giving up of some advantage which but for such waiver the party would have enjoyed. *Silverhorn v. Ins. Co.*, 366, 371.

See also *Lewers & Cooke v. Wong Wong*, 39, 44.

See CORPORATIONS, 1, 2, 3; MECHANICS LIEN, 1; MUNICIPAL CORPORATIONS, 1; NEW TRIAL, 3; VENDOR AND PURCHASER, 1, 2, 3.

## WAR.

1. *States and territories.*

The power to fix prices is a war power and is not enjoyed by the states and territories. *Ter. v. McCandless*, 485.

2. *Rights to fix food prices is war power.*

This authority to legislate is conferred upon Congress by those constitutional provisions which grant to it power to declare war, to raise and support armies, etc., and which is known as the war-power of Congress. *Ter. v. McCandless*, 485, 489.

3. *Authority of Congress to fix prices for foods.*

Congress possesses authority under the war-power conferred by the Constitution of the United States to enact laws regulating the prices of food and other commodities which may be helpful to the nation while engaged in war. *Ter. v. McCandless*, 485, 490.

## WAREHOUSEMEN.

See STATES, 2.

## WATERS AND WATERCOURSES.

1. *Private water rights—basic law.*

Private water rights in Hawaii are governed by the principles of the common law of England except so far as they have been modified by or are inconsistent with Hawaiian statutes, custom or judicial precedent. The law of priority of appropriation which prevails in the arid sections of the mainland of the United States has never been recognized in this Territory. *Carter v. Territory*, 47, 57.

2. *Ancient ditches—appurtenant rights.*

Ancient ditch systems connected with running streams became incorporated into the permanent topography of the country, and upon the acquisition of private titles to lands to which such ditches were tributary the right to water therefrom, in accordance with custom, passed as an appurtenance or incident with-

## WATERS AND WATERCOURSES—Continued.

out express mention in the award or grant. *Carter v. Territory*, 47.

3. *Proof of quantity.*

Where the use of water upon land by ancient custom is shown by satisfactory evidence the right is not to be denied merely because the quantity has not been measured and cannot be proven. *Carter v. Territory*, 47, 59.

4. *Irrigation right—proof—quantity.*

Where a customary use of water for irrigation upon land at the time it first became the subject of private ownership is shown by satisfactory evidence the quantity is to be determined by the amount used at and immediately prior to the date of the award or grant, but the right is not to be denied merely because that quantity was not measured and cannot be proven. *Carter v. Territory*, 47, 59.

5. *Ancient use of ditches.*

Where ditches are shown to have been entitled by ancient use to take from a stream a definite proportion of the water normally flowing therein the same division is to be maintained in times of diminished flow. The rule is the same where the division is by time. *Carter v. Territory*, 47, 60.

6. *Ditches as watercourses.*

Large ditches which were constructed and have been used for the purpose of diverting a constant flow of water from a stream and distributing it among several parcels of land are to be regarded virtually as natural watercourses. *Carter v. Territory*, 47, 61.

7. *Ancient ditches—proportional diminution.*

Ancient ditches which were constructed and have been used for the purpose of diverting a constant flow of water from a stream and distributing it among several parcels of land are to be regarded virtually as natural water courses, and in case of drought or diminished supply the flow in one ditch may not be increased by artificial means to the detriment of lands entitled to water from another ditch, but the dams must remain as they were and all must suffer accordingly. The general principle of proportional diminution in times of scarcity applies as well to different lands along one ditch as between different ditches from the same stream, but where the supply has greatly diminished the rule will not be applied as between the several owners on a long ditch if the entire flow would be lost through seepage and evaporation. *Carter v. Territory*, 47, 64-6.

8. *Natural and artificial use—superior right.*

The natural use of water for domestic purposes is a superior right to its use for artificial purposes. *Carter v. Territory*, 47, 66.



## WATERS AND WATERCOURSES—Continued.

9. *Change in method of diversion.*

A concrete dam to divert water from a stream may be substituted for a rubble dam of loose construction if the change works no injury to other rights in the stream. *Carter v. Territory*, 47, 68.

10. *New use—burden of proof.*

Under ordinary circumstances the burden of showing that a new diversion of water does not prejudice the right of another is upon the party asserting the right to the new use, but where the extent of the right possessed by the other is not known to himself and cannot be ascertained, the new use, if a beneficial one, ought not to be restrained upon merely conjectural grounds. *Carter v. Territory*, 47, 69.

11. *Right to drinking water on ahupuaas.*

The right to drinking water declared by section 471 of the Revised Laws for the people on ahupuaas privately owned is a right in gross as distinguished from an appurtenant right to water for domestic use. *Carter v. Territory*, 47, 67.

12. *Surplus water of streams.*

Where a stream flows through one ahupuaa into another each ahupuaa is entitled to a reasonable use of the surplus water of the stream according to the principles applicable to riparian rights at common law. *Carter v. Territory*, 47, 70.

13. *Water controversy—authority of commissioner.*

In a water controversy the authority of the circuit judge, sitting as commissioner, and the supreme court on appeal, is limited to ascertaining, determining, defining and enforcing proven rights. *Carter v. Territory*, 47, 69.

See also ABANDONMENT, 1; EASEMENTS, 1.

## WILLS.

1. *Construction—probate courts.*

In the absence of statute probate courts have no jurisdiction to construe wills except to such incidental extent as may be necessary in the exercise of their general jurisdiction over the ordinary administration of estates. *Estate of Kaiena*, 148, 150.

2. *Construction—courts of equity.*

A court of equity has no jurisdiction to construe a will where the claims of the parties are of a strictly legal character and no trust is involved. *Estate of Kaiena*, 148, 150.

3. *Construction—supplying blanks.*

Extrinsic evidence of intention as an independent fact is inadmissible for the filling up a total blank in a will, or supplying a devise, or other material provision, term or qualification omitted

## WILLS—Continued.

by mistake; and for this purpose the clearest oral declarations of intent are inadmissible. *Bertelmann v. Cockett*, 230, 237.

4. *Construction—technical words.*

In order to create an estate or to limit an estate devised technical words required in a deed are not necessary in a will, greater latitude being allowed in the case of the latter. *In re Rosenbledt*, 298, 306.

5. *Estate for years—repairs—insurance—taxes.*

The testatrix devised to the infant daughter of plaintiff certain real estate known as the "home", and by a codicil to her will directed that plaintiff and his family "may enjoy the said home herein mentioned, free of rent, during the minority" of the said infant daughter: Held, (1) that plaintiff and his family take an estate for years—during the minority of said infant daughter—in the home place, and not a mere license to occupy the same, and may lease the said home place and collect the rents therefor; (2) that plaintiff and his family take such estate for years subject to the burden of usual repairs, and additions made to the house by plaintiff voluntarily, which result in the direct benefit of himself and family, cannot be recovered by him against the estate of his said infant daughter; (3) that plaintiff has an insurable interest in the improvements on said "home" and may insure the same or not as he sees fit; (4) that the infant daughter has an insurable interest which the guardian may insure at the expense of her estate; (5) that for the purposes of taxation the estate for years should be assessed to plaintiff and his family and the interest of the infant daughter should be assessed as against her guardian, each party to pay the taxes assessed to him respectively. *Bickerton v. Bickerton*, 388.

6. *Legacies—annuity.*

A legacy of \$100 per month which is reserved to plaintiff by the terms of a will constitutes a claim against all the assets of the estate which is prior to any rights enjoyed by the residuary legatee or which he might create by agreement. *Jarrett v. Von Holt*, 419, 420.

7. *Residuary legatee—annuity.*

Where a will devises to respondent all of testator's estate except two small legacies and directs that respondent pay to petitioner one hundred dollars monthly during her lifetime and makes the same a charge upon the estate, the transfer is to respondent who takes subject to the charge which is a lien on the estate. *Estate of Brown*, 443.

8. *Attempts to confer jurisdiction.*

Where a testator in his will attempts to confer jurisdiction upon

**WILLS—Continued.**

a judge in his judicial capacity, where the judge as a matter of law has jurisdiction in the premises, the judge acts by virtue of the law conferring jurisdiction upon him and not under the authority of the provisions of the will, and in case jurisdiction is subsequently taken from such judge and is transferred to another judge the power to act *ipso facto* passes to such other judge. *Estate of Carter*, 536, 539.

**9. Construction—attorney's fees.**

In cases involving the construction of a will the general rule is that where the testator has expressed his intention so ambiguously as to create a difficulty which makes it necessary to go into a court of chancery to get a construction of the will and to remove the difficulty, the cost of litigation, including reasonable attorneys' fees to all necessary parties, must be borne by the estate and the general residue is the primary fund for the payment of such costs. *Estate of Brown*, 573, 577.

**10. Contests—attorney's fees.**

A contest between an annuitant and a residuary legatee as to which one is liable for the payment of an inheritance tax, to which a construction of the will is incidental, is not such a case as warrants the allowance of attorney's fees out of the estate. *Estate of Brown*, 573.

See also COURTS, 2.

**WITNESSES.****1. Cross-examination—impeachment.**

A witness may be cross-examined with reference to his past life if such matters tend to weaken his credibility though they might tend to criminate, disgrace or degrade him, and may be compelled to answer unless he claims his constitutional privilege of refusing to answer questions which might tend to criminate him. *Ter. v. Goo Wan Hoy*, 721, 727.

**2. Cross-examination—discretion of court.**

The extent to which collateral matters may be inquired into upon cross-examination for the purpose of impeaching the credibility of a witness is discretionary with the trial court and its rulings are not subject to review here unless the discretion is abused. *Ter. v. Goo Wan Hoy*, 721, 727.

**3. Scope of examination.**

A witness may upon cross-examination be thoroughly sifted as to his antecedents, and this applies to a defendant when he elects to become a witness on his own behalf. *Ter. v. Goo Wan Hoy*, 741, 744.

See also CONSTITUTIONAL LAW, 7; CRIMINAL LAW, 5, 12; EVIDENCE, 8, 9, 10, 11; RAPE, 3.

## WORDS AND PHRASES.

## 1. "Adverse party."

The phrases "adverse party" and "opposite party" are synonymous terms when employed in the rules of appellate procedure. *Kealoha v. Halawa Plant.*, 436, 441.

## 2. "As designated above."

The phrase "as designated above," used in the habendum, signifies: "As pointed out above; as made known above; as in the manner shown above; as described above." *Naopala v. Hina*, 341, 344.

## 3. "Children, legitimate or legitimated."

The phrase "children, legitimate or legitimated," as used in a by-law of a beneficial society, is broad enough to and does include a child that has been legally adopted under the statute of adoption. *Souza v. Lusitana Society*, 396, 399.

## 4. "In the course of."

The words "out of" point to the origin and cause of the accident or injury, the words "in the course of" to the time and place and circumstances under which the accident or injury takes place. *Silva v. Kaiwiki Mill Co.*, 324, 328.

## 5. "Modify."

"Modify" means to change or vary, to qualify or reduce, and the power given to modify implies the existence of the subject matter to be modified. *Chinese Society v. Yee Yap*, 473, 475.

## 6. "Nunc pro tunc."

The term "nunc pro tunc" signifies or means "now for then" or that a thing is done now that shall have the same legal force and effect as if done at the time it ought to have been done. *Makainai v. Lalakea*, 518, 522.

## 7. "Opposite party."

The phrases "adverse party" and "opposite party" are synonymous terms when employed in the rules of appellate procedure. *Kealoha v. Halawa Plant.*, 436, 441.

## 8. "Out of."

The words "out of" point to the origin and cause of the accident or injury, the words "in the course of" the time and place and circumstances under which the accident or injury takes place. *Silva v. Kaiwiki Mill Co.*, 324, 328.

## 9. "Waiver."

A waiver is the intentional relinquishment of a known right. *Lewers and Cooke v. Wong Wong*, 39, 44.

## 10. "Waiver."

A waiver is defined as the failure to insist upon some right, claim or privilege and a foregoing or giving up of some advantage

## WORDS AND PHRASES—Continued.

which but for such waiver the party would have enjoyed. *Silverhorn v. Insurance Co.*, 336, 371.

See also TRIAL, 2.

## WORKMEN'S COMPENSATION ACT.

1. *Construction of certain phrases in.*

The words "out of" and "in the course of," as used in the Workmen's Compensation Act, providing that if a workman receives personal injuries by accident arising out of and in the course of his employment he shall be compensated, are not synonymous terms. An injury may be received in the course of the employment and still have no casual connection with it so that it can be said to arise out of the employment. *Silva v. Kaiwiki Mill Co.*, 324, 327.

2. *Construction.*

Compensation acts being highly remedial in character, though in derogation of the common law, should generally be liberally and broadly construed to effectuate their beneficent purposes. *Silva v. Kaiwiki Mill Co.*, 324, 330.

3. *Construction.*

S, the manager of a sugar mill, was accidentally injured while participating in a celebration which took place at the final completion of the construction of the mill it being his duty to assist in conducting the celebration. Held that the injury sustained by S arose both out of and in the course of his employment. *Silva v. Kaiwiki Mill Co.*, 324, 331.

4. *Compensation to injured employee.*

Where an employee is accidentally injured resulting in temporary total disability and permanent partial disability the injured employee should be awarded sixty per cent. of his average weekly wage for the period of his total disability and after reaching the stage of convalescence where he ceased to be totally disabled but remained in a state of permanent partial disability he should receive for an additional definite number of weeks fifty per cent. of his average weekly wage. *Ching Hon Yet v. See Sang Co.*, 731, 734.

5. *Appeals under.*

The appeal provided in the workmen's compensation act contemplates a general appeal upon both the law and the facts and a trial of the cause *de novo* in the appellate court. *Ching Hon Yet v. See Sang Co.*, 731, 736.

6. *Sufficiency of notice of claim.*

Where the notice served by the employee upon the employer contains a statement that the injury consists of the "loss of four

**WORKMEN'S COMPENSATION ACT—Continued.**

fingers of left hand" it sufficiently describes the nature of the injury. The effect of the injury upon the employee became a matter of proof. *Ching Hon Yet v. See Sang Co.*, 731, 738.

**7. Pleadings.**

Neither technical nor formal pleadings are required in proceedings under the Workmen's Compensation Act. *Ching Hon Yet v. See Sang Co.*, 731, 739.

**8. Loss of hand.**

Where at the trial the evidence established that the employee had by reason of the accident lost the use of his hand it was not error for the court to award the injured employee compensation for the loss of the use of his hand. *Ching Hon Yet v. See Sang Co.*, 731.

See also **APPEAL AND ERROR**, 48; **CONSTITUTIONAL LAW**, 2, 3, 4.

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